Supreme Court, U.S.
FILED

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In the

Supreme Court of the United States

GERALD BURGE,

Petitioner,

v.

RODNEY JACK STRAIN,
Sheriff of St. Tammany Parish,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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89 pp

QUESTION PRESENTED

1. Can a *Monell* claim for damage under 42 U.S.C.A. §1983 ever arise the first time a longstanding policy, custom, or practice of a municipality results in a constitutional violation?

PARTIES TO THE PROCEEDING

1. Gerald Burge, Plaintiff/Petitioner

2. Rodney Jack Strain, Sheriff of St. Tammany Parish, Defendant/Respondent

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JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its judgment on June 25, 2003. Petitioner's Petition for Rehearing was denied on August 8, 2003. The jurisdiction of this Court is invoked under 28 U.S.C.§1254(1).

RELEVANT PROVISIONS

The Fourteenth Amendment of the United States Constitution provides in pertinent part:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the

> State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C.A. §1983 provides in relevant part:

> Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit inequity, or other proper proceeding for redress...42 U.S.C.A §1983.

STATEMENT

This suit was originally brought in the United States District Court for the Eastern District of Louisiana pursuant to 42 U.S.C.A. §1983. The suit was filed in June 1991 by petitioner, Gerald Burge, and alleged that he was entitled to damages as a result of the violation of his Fourteenth Amendment right to due process occasioned by a denial of exculpatory and other

evidence that constituted *Brady* material during the course of his criminal prosecution for the murder of Douglas Frierson. Petitioner/plaintiff alleged that the defendants therein either directly, or in their official capacity, engaged in conduct which resulted in his denial of a fair trial, a violation of his right to due process under the Fourteenth Amendment of the United States Constitution and as such he was wrongfully convicted for the murder of Douglas Frierson.

Underlying Factual Background

On October 17, 1980, at approximately 4:00 a.m. the body of Douglas Frierson, a native of Picayune, Mississippi was found under the West Pearl River bridge in St. Tammany Parish, Louisiana. The discovery of the body was called in and Detective Gary Hale of the St. Tammany Parish Sheriff's Office immediately traveled to the crime scene.

A crime scene investigation conducted by Hale and others, revealed the identity of the murder victim and the fact that he had apparently been shot in the head and abdomen multiple times. At the scene, the Sheriff's Office photographed tire tracks and took red paint scrapings from a pillar of the bridge support and believed that they belonged to a red car thought to perhaps have been driven by the murderer.

Detective Hale began to conduct interviews with members of the Frierson family and other people who may have possibly possessed knowledge of Douglas Frierson's whereabouts in the hours preceding his murder. Interviewed on that day was one Jean

Frierson, the mother of Douglas Frierson. Also interviewed was one Joe Pearson, his girlfriend Jo Ellen Presswood, and Sgt. Brenda Smith of the Picayune Police Department as well as many others.

In a statement taken from Ms. Jean Frierson, the murder victim's mother, she told Detective Hale that her son had come home at approximately 12:10 a.m. on October 17, 1980. Ms. Frierson then prepared him some pancakes and he left shortly after eating this meal with a person who had driven into the driveway. Ms. Frierson testified that she could not identify the person who picked her son up nor did she recognize the vehicle in which her son left. The is the last time she saw him alive.

Sgt. Brenda Smith of the Picayune Police Department was also interviewed. She gave a tape recorded statement to Detective Hale that at 12:45 a.m. on October 17, 1980, while on patrol in Picayune, Mississippi, she had stopped a suspicious vehicle. In this vehicle was the murder victim, Douglas Frierson, and three other men, none of whom were Gerald Burge.

Despite this, Detective Hale arrested Gerald Burge for the murder of Douglas Frierson on October 24, 1980. On December 8, 1980, the District Attorney's Office refused the charges against Burge on the basis of insufficient evidence and Burge was released.

Many months later, on April 20, 1981, Hale conducted another interview with Jo Ellen Presswood, Joe Pearson's girlfriend. At that time, Ms. Presswood told Hale that Joe Pearson had admitted, in her presence, to having committed the murder of Douglas

Frierson. The next day, April 21, 1981, Detective David Brooks of the Mississippi Highway Patrol informed Detective Hale that Pearson had also admitted to the slaying in front of a Rhonda Spears and that Sheriff Ladner of the Hancock County Mississippi Sheriff's Office confirmed this fact. This information was placed in a handwritten supplemental report by Hale and, according to him, turned in to the Sheriff's Office.

Sometime in the summer of 1981, Detective Gary Hale resigned from the St. Tammany Parish Sheriff's Office. He eventually went to work for Pearl River County in Mississippi. While there and acting as chief jailer of Pearl River County in late 1983, he once again encounters Joe Pearson. By this time, Pearson is serving time on an armed robbery charge. Pearson indicates to Hale that he has information concerning the murder of Douglas Frierson. Hale then contacted the St. Tammany Parish Sheriff's Office who responded by sending the new Chief of Detectives, Captain Freddy Drennan and Detective Michael Moore, who have by now been placed in charge of the investigation to meet with Pearson. After Captain Drennan and Detective Moore meet with Pearson, a deal is struck where in exchange for transfer to the custody of St. Tammany Parish Sheriff's Office on the armed robbery charge, Pearson agrees to provide information on the murder of Douglas Frierson. In particular, Pearson claims to be an accessory after-the-fact and claims that he witnessed Burge pull the trigger of the gun that killed Frierson. On December 8, 1983, Burge is indicted for the second degree murder of Frierson. Pearson pleads guilty to accessory after-the-fact and receives a three year sentence which he is allowed to serve

concurrently with his armed robbery sentence.

On April 4, 1984, a *Brady* motion brought by Gerald Burge's criminal defense attorney is filed. In that motion, Burge requested any and all exculpatory evidence in the prosecution's possession. On July 5, 1984, Assistant District Attorney Rick Schwartz produces all exculpatory evidence that the District Attorney's Office has that had been provided by the Sheriff's Office. Schwartz does not produce any statements of Jean Frierson, Jo Ellen Presswood or the report of Sgt. Brenda Smith or the supplemental report of Detective Hale concerning the confession to the murder of Frierson by Joe Pearson.

On September 15, 1986, Burge's trial for the murder of Douglas Frierson begins. At this time, the 22nd Judicial District Court's District Attorney's Office, led by Assistant District Attorney Paul Katz, presents as witnesses, Jean Frierson, the murder victim's mother, and Joe Pearson.

Jean Frierson testified that on the night her son's death, she saw her son leave in the company of Gerald Burge and Joe Pearson. This is directly at odds with her statement given to the Sheriff's Office shortly after the crime that she did not recognize who her son had left with that night.

Joe Pearson testified that he saw Gerald Burge murder Douglas Frierson.

No information concerning the prior inconsistent statement of Jean Frierson or the confession of Joe Pearson to the murder is brought out at this trial.

Not surprisingly, Burge is convicted of second degree murder and sentenced to life in prison at hard labor.

Subsequent thereto, Lt. Al Herman, former Chief of Detectives of the St. Tammany Parish Sheriff's Office, becomes aware of and into possession of certain supplemental reports and evidence gathered by the St. Tammany Parish Sheriff's Office during the course of the criminal investigation into the murder of Douglas Frierson. This evidence including a transcript of the taped statement of Jean Frierson, the statement of Sgt. Brenda Smith, the supplemental report of Detective Gary Hale concerning the confession of Joe Pearson to the murder of Douglas Frierson, are turned over to Burge's family. Burge brings a Motion for New Trial in the 22nd Judicial District Court.

On June 20 and 22, 1990, a hearing on Burge's Motion for New Trial, is held before the Honorable Steven Duczer, Judge, 22nd Judicial District Court. At that hearing, the District Attorney's Office testifies under oath that it never had been provided by the Sheriff's Office with the exculpatory information in question. Judge Duczer, grants the Motion for New Trial and orders that the previous murder conviction be overturned.

On September 9, 1992, Burge's second murder trial begins. Once again, the prosecution calls Jean Frierson and Joe Pearson. This time however, their credibility is successfully challenged by Burge as a result of the information contained in the supplemental reports which the District Attorney claimed had never been previously turned over to its office. Burge is

found not guilty of the murder of Douglas Frierson.

Underlying Procedural History

In June, 1991, petitioner, Gerald Burge, brought suit pursuant to 42 U.S.C.A. §1983 claiming that members of the Sheriff's Office and District Attorney's Office had deprived him of his due process right to a fair trial by suppressing evidence of an exculpatory nature. The initial complaint named as defendant, Sheriff Patrick Canulette, individually and in his official capacity as Sheriff of St. Tammany Parish, Detective Gary Hale, and the District Attorney, Walter Reed, and Assistant District Attorney, Paul Katz.

Subsequent thereto, the defendants brought an exception of prescription alleging that the claim of Gerald Burge had prescribed. The exception was granted by the district court and Burge's claims were dismissed. An appeal was taken to the United States Court of Appeals for the Fifth Circuit and on September 22, 1993, an Opinion was rendered overturning the district court's ruling that Burge's claim had prescribed. *Burge v. Parish of St. Tammany*, 996 F.2d 786 (C.A. 5th Cir. 1993) (Burge I).

Subsequent thereto, Burge supplemented and amended his claim on several occasions bringing in additional sheriff deputies and district attorneys as defendants under various state law theories.

In 1995, the district attorney defendants and Sheriff Canulette, Gary Hale and the Sheriff's Department defendants, brought various motions for summary judgment against the claims raised by Burge.

The district court granted the motions in part and denied them in part. In particular, the claims against District Attorney Walter Reed and the individual assistant D.A.s were dismissed on the basis of prosecutorial immunity. The summary judgments brought by Sheriff Canulette in his official capacity and Detective Hale were denied.

Cross appeals by both Sheriff Canulette and Detective Hale and Burge, resulted. The Fifth Circuit Court of Appeal upheld the ruling of the district court dismissing the claims against District Attorney Reed and the Assistant District Attorneys and also affirmed the denial of the Motion for Summary Judgment of Sheriff Canulette and Detective Hale. *Burge v. Parish of St. Tammany*, 187 F.3d (5th Cir. 1999) (*Burge II).* The case against the Sheriff and Hale proceeded to trial.

In the course of trial, testimony was elicited that showed that the Sheriff's Office had a long history with regard to failing to turn over to the District Attorney evidence gathered during the course of criminal investigations. In particular, according to the District Attorney's investigator, Mr. Mario Arthur, it was common for supplemental reports and witness statements not to make their way into files bound for the District Attorney's Office and that the practice had been ongoing for years. (Appendix H, transcript of Mario Arthur testimony, Record Vol. 36, pps. 68 & 69). Mr. Arthur further testified that there was no policy in place concerning information being sent over by the Sheriff as it was received. (Record Vol. 36, pps.68, lines 5 through 8).

This was confirmed by Sheriff Patrick Canulette, the person charged by the Louisiana Constitution with formulating policies for the Sheriffs Office. When Sheriff Canulette was asked specifically what were the policies in place between 1980 and 1986 with regard to turning over investigatory materials uncovered by his office to the District Attorney's Office, Sheriff Canulette testified that he did not know what the policy was and that he was not familiar with those policies. (Transcript of Patrick Canulette testimony, Record Vol. 36, pps. 87, lines 2 through 16)!

District Attorney Walter Reed testified that there have been instances in the past where the defendant's constitutional rights were violated as a result of the failure to receive paperwork from the Sheriff's Office. (Transcript of District Attorney Walter Reed testimony, Record Vol. 37, pps. 273, 274 and 275). However, the Sheriff testified that there had never been a previous instance of a *Brady* violation as the result of the Sheriff not turning over evidence to the District Attorney.[1]

The testimony of various District Attorneys including Paul Katz and Brady Fitzsimmons also indicated that the exculpatory information in question had never been received by the District Attorney's Office from the Sheriff's Office.

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[1]Giving lie to this claim is *Kirkpatrick v. Whitley*, 992 F.2d 491 (5th Cir. 1993) and *Faulkner v. Cain*, 133 F.Supp.2d 449 (E.D. La. 2/7/01).

On May 11, 2001, a jury returned a verdict in favor of Gerald Burge and against Detective Gary Hale for a violation of his constitutional right to due process and for intentional infliction of emotional distress and awarded damages to Burge against Hale pursuant to 42 U.S.C.A. §1983 as well as under Louisiana law.

The jury also found, in response to specific interrogatories submitted to it by the Court (and concurred in by the Sheriff), that the Sheriff of St. Tammany Parish had failed to:

> "adequately train or supervise his employees and deputies in, or to have proper and adequate policies, practices, and procedures regarding the handling and transmittal of document and investigative files, so as to constitute deliberate indifference to Burge's constitutional rights, that this was a legal cause of damage to Gerald Burge." (See Appendix F, Jury Interrogatory No. 6).

Hale did not appeal the judgment against him and it has become final. However, Sheriff Rodney "Jack" Strain, the newly elected Sheriff of St. Tammany Parish who had been substituted for Patrick Canulette brought a post-trial motion seeking a judgment notwithstanding the verdict. This motion was denied. Sheriff Strain then took an appeal to the United States Fifth Circuit Court of Appeals. On June 25, 2003, the United States Fifth Circuit Court of Appeals reversed the jury's finding in favor of Burge against the Sheriff. *Burge v. St. Tammany Parish*, 336 F.3d 363 (5th Cir. 2003). (Burge III)

In overturning the jury verdict, the Fifth Circuit held:

> Because Burge failed to establish the existence of a single prior *Brady* violation, let alone demonstrate a pattern of similar *Brady* violations sufficient to demonstrate deliberate indifference on the part of the Sheriff, we find that no reasonable jury could have concluded that Sheriff Strain in his official capacity was deliberately indifferent to Burge's right to a fair trial. *Burge III*, *supra* at 373.

Burge brought a Petition for Rehearing which was denied on the 8th day of August 2003. This Petition for a Writ of Certiorari in Review has resulted.

REASONS FOR GRANTING THE WRIT

This decision of the United States Fifth Circuit Court of Appeals, effectively means is it impossible for a plaintiff under 42 U.S.C.A. §1983 to prove deliberate indifference in any other way except by showing a series of prior constitutional violations. In those situations where the custom, practice, or policy complained of is not facially unconstitutional, the first person whose constitutional rights are violated (and indeed some multiple of individuals thereafter), have no *Monell* claim whatsoever even if a policy or practice is substantially certain to result in a *Brady* violation. Under this unreasonable requirement that there must be a pattern of prior constitutional violations, deliberate indifference can never be proven no matter how certain a constitutional violation is to arise at some

point in time in the future as a result of the policy (or lack thereof) or practice in question.

Where a practice, custom or policy which is certain to **eventually** result in a constitutional violation if allowed to continue, the requirement of proof of a series of prior constitutional violations should not be a pre-requisite to a finding of deliberate indifference.

The Fifth Circuit has in effect given every municipality a free pass to violate the constitutional rights of those citizens that are unlucky enough to be one of the first few (or more) to have been victims of such a practice or policy. This is completely contrary to and at odds with the deterrent purpose of 42 U.S.C.A. §1983. Indeed, such a "free pass" serves to encourage behavior, practices, usages, or policies which are substantially certain to result in a constitutional violation. This is an important question of federal law that should be settled by the Court.

SUMMARY OF ARGUMENT

Sheriff's employees repeatedly testified that they are aware of the absolute importance of turning over information gathered during the course of a criminal investigation to the District Attorney. If fact, they frequently stated that it was their goal to turn over all such information.

Despite knowledge of the importance and of the obvious consequences of a failure to do so, Sheriff Canulette testified that he was unaware of any policies establishing procedures and regulations to carry the burden to ensure communication of all relevant

information to the District Attorney. This from the officer appointed by the Louisiana Constitution to set such policies!

As a result thereof, the undisputed testimony was that the Sheriff's Office commonly failed to forward witnesses' statements and supplemental reports to the District Attorney and that the District Attorney would have no way of knowing that such information was available unless other information contained in the file should refer to it.

Based on this, the jury determined that the Sheriff, in his official capacity, was deliberately indifferent to the constitutional rights of Gerald Burge.

The United States Court of Appeals for the Fifth Circuit, however, ruled that even though the Sheriff was well aware of the importance of turning this information over to the District Attorney and of the obvious consequences of the failure to do so, that there nevertheless must be a series of prior constitutional violations before *Monell* liability can arise.

This is contrary to 42 U.S.C.A. §1983 and its deterrent purposes.

ARGUMENT

I.

Can a practice of a Sheriff's Office, which has apparently never before resulted in a *Brady* violation nevertheless be actionable under *Monell v. City of New York*, if continuation of the practice is substantially certain to result in such a *Brady* violation?

Under *Brady v. Maryland*, 83 S.Ct. 1194 (1963) and its progeny, the state has an obligation and duty to turn over to a criminal defendant all evidence which may be favorable and/or of an exculpatory nature or all evidence which may impact upon the credibility of witnesses that will be called at trial to testify against him. Failure to do so results in a violation of a defendant's constitutional right to due process and a fair trial.

The United States Fifth Circuit Court of Appeal's opinion overturned the jury's determination that the St. Tammany Parish Sheriff's Office and Sheriff, Rodney "Jack" Strain, in his official capacity acted with deliberate indifference towards the constitutional rights of those individuals with whom his office came into contact. What's more, the clear language of the opinion has effectively written out of existence the concept that deliberate indifference can be proven even if there is no prior evidence of constitutional violations. Effectively, by reversing the verdict of the jury in this matter, the United States Fifth Circuit Court of Appeals has instituted a rule of law that there is an absolute pre-requisite of proving

prior constitutional violations before a finding of deliberate indifference can ever be made no matter how certain such a violation is to occur if a practice continues. It is respectfully suggested that this is incorrect and contrary to this Court's holdings in *Monell v. Department of Social Services, City of New York*, 436 U.S. 658, 690, 98 S.Ct. 2018, 2036 (1978); *City of Oklahoma City v. Tuttle*, 105 S.Ct. 2427, 471 U.S. 808, 85 L.Ed. 2nd 791, rehearing denied, 106 S.Ct. 16, 473 U.S. 925, 87 L.Ed.2nd 695; *Board of Commissioners of Bryan County Oklahoma v. Brown*, 117 S.Ct. 1382 (1997) and *Canton v. Harris*, 109 S.Ct. 1197 (1989) and contrary to the purpose of 42 U.S.C.A. §1983.

42 U.S.C.A §1983 states:

> Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit inequity, or other proper proceeding for redress. 42 U.S.C.A §1983.

This Court has long held that the purpose of 42 U.S.C.A. 1983 is to "deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if this deterrence fails." *Wyatt v. Cole*, 112 S.Ct.

1827 (1992); *Carey v. Piphus*, 98 S.Ct. 1042, 1047-1049 (1978).

In *Monell*, this Court held:

> "...local governments, like every other §1983 "person," by the very term of the statute, may be sued for constitutional deprivations, if it is pursuant to governmental "custom" even though such a custom has not received formal approval through the bodies official decision making channels.
>
> *Monell, supra* at 2036.

However, the Supreme Court went further and stated:

> "On the other hand, the language of §1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless the action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable solely because it employs a tortfeasor- - or, in other words, a municipality cannot be held liable under §1983 on a *respondeat superior* theory. *Monell, supra* at 2036.

With regard to Sheriff Strain's official capacity liability, the district court, without objection by the

Sheriff (and in concurrence with him) charged the jury as follows:

> To establish that the plaintiff's constitutional deprivation was due to the official policy, practice, or procedure of the Sheriff's Office, the plaintiff may prove its official policy in one of three ways: 1. When the Sheriff promulgates a generally applicable statement of policy and the subsequent complained is simply an implementation of that policy; 2. *Where no official policy was announced, adopted, or promulgated, but there is proof of a persistent, widespread practice of government officials or employees, which, although not authorized by officially adopted or promulgated policy, is so common and well settled as to constitute a custom that is fairly represented government policy.* Actual or constructive knowledge of such custom must be attributable to the governmental body or to an official to whom that governmental body delegated policy making authority; or 3. Even if the Sheriff fails to act affirmatively or at all, the need to take some action to control the agents of the Sheriff is so obvious, *the inadequacy of the existing practice is so likely to result in the violation of constitutional rights, that the Sheriff can reasonably be said to be indifferent to the need.* (Appendix G, pps 16 & 17 of jury charges).

Clearly, by ruling in favor of Gerald Burge, the jury found that the evidence supported the conclusion that there was a persistent and wide spread practice of government officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represented government policy and/or that the inadequacy of the Sheriff's practices were so likely to result in a constitutional violation that the Sheriff can be said to be deliberately indifferent.

The Fifth Circuit Court of Appeal in its opinion overturning the jury's verdict, did not do so on the grounds that there was not sufficient proof of such a policy, practice or procedure. In light of the testimony of Mario Arthur, Walter Reed, Al Herman and others, such a finding by the jury is unassailable under long established jurisprudence with regard to what is the appropriate standard of review for a jury's factual findings. *Cozzo v. Tangipohoa Parish*, 279 F.3d 273 (5th Cir. 1/10/02); *Brady v. Fort Bend County*, 145 F.3d 691 (5th Cir. 1998). Rather the appellate court acknowledged there was significant evidence of such a practice.

Therefore, it is clear that in order for Mr. Burge to recover against Sheriff Strain in his official capacity as Sheriff of St. Tammany Parish for his practices, he must next prove causation, i.e., that his failure to receive *Brady* material was a result of some policy (or lack thereof), custom, practice or common usage of the Sheriff's Office.

It is respectfully suggested, and as the Fifth Circuit clearly indicates in its opinion, causation was in

fact proven.

The Fifth Circuit stated:

> We assume for present purposes that the evidence suffices to show that, as Burge asserts, the Sheriff's Office failed to transfer the entire investigatory file to the District Attorney and that such a failure was a cause of the *Brady* violation. ***The issue on appeal is thus narrowed to whether Burge presented sufficient evidence to establish knowledge or deliberate indifference to the likelihood of a constitutional violation on the part of the Sheriff...****(Burge III, supra* at 370, 371).

Although the Fifth Circuit correctly held that Burge had proven causation, it incorrectly stated the burden which must be carried in order to prove deliberate indifference. Proof of prior constitutional violations is not or should not be a *sine qua non* to a fact finder's determination of deliberate indifference if there is a substantial certainty that the policy or practice will result in a constitutional violation if allowed to continue.

Another issue not in dispute is that the Sheriff had actual knowledge of the importance of conveying **relevant evidence to the District Attorney and of the constitutional consequences of a failure to do so.**

This Court in *Kyles v. Whitley*, 115 S.Ct. 1555 (1995), addressed the issue of the importance of the

police providing information they gathered during the course of a criminal investigation to a District Attorney and what consequences that failure would have on a criminal defendant's right to a fair trial. In *Kyles*, this Court stated what the duty was with regard thereto, but also the obvious risk to an accused if it did not happen.

In holding that the prosecution cannot hide behind the failure of the police to provide them with exculpatory and/or *Brady* material uncovered during the course of an investigation, the Supreme Court stated:

> No one doubts that police investigators sometimes fail to inform a prosecutor of all they know. ***But neither is there any serious doubt that "procedures and regulations can be established to carry the burden and to ensure communication of all relevant information on each case to every lawyer who deals with it.*** *Kyles v. Whitley, supra* at 1567.[2]

As the Fifth Circuit correctly points out in its opinion in *Burge III*, the Sheriff and his personnel were well aware of the great importance of turning over all of the information gathered during the course of a criminal investigation to the District Attorney and the

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[2]In Burge II, *supra* at 473, the Fifth Circuit indicates that under Louisiana law it was Sheriff Strain's legal obligation to promulgate such policies.

consequence that might arise out of a failure to do so! (*Burge III, supra* at 372) Indeed, the testimony of Captain McCormick is specifically referenced by the Fifth Circuit. The Sheriff's Office itself consistently maintained that its goal was to turn over everything in order to ensure that a criminal defendant's *Brady* rights were safeguarded. However, as detailed by Mario Arthur and others, the Sheriff's actual practices and usages were far from meeting its stated goal. Obviously, the Sheriff knew how important it was to turn over all evidence gathered during a criminal investigation to the District Attorney and what the consequences were of a failure to do so.

Despite this Court's statement that there "can be no serious doubt that procedures and regulations can be established to carry the burden and to ensure communication of all relevant information," and the admitted fact that the Sheriff's Office was well aware of its vital importance, the Fifth Circuit concludes that the Sheriff was not able to foresee a *Brady* violation as a consequence of its practice of not turning over all information gathered during the course of a criminal investigation to the District Attorney.

The Fifth Circuit's reasoning is extremely curious. According to the Appellate Court, because of the fact that the vast majority of the documents gathered by the Sheriff's Office during the course of the investigation but not turned over to the District Attorney's Office, were either inculpatory or neutral in nature, it is not reasonably foreseeable that if that practice continues long enough, that *Brady* material would be withheld. This logic does not stand up to even cursory examination.

If such a practice continues long enough it is a virtual certainty that *Brady* material will be withheld at some point in time! The idea that most of the evidence not turned over just happens to not be *Brady* material, should not excuse those instances when *Brady* material is withheld.

CONCLUSION

The Fifth Circuit is saying that municipalities can play Russian Roulette with the constitutional rights of those individuals with whom they come into contact because the chances are much more likely that the hammer will fall on an empty chamber and not on a live round. The fallacy in this reasoning is that, if you continue to play Russian Roulette long enough, it is substantially certain that someone is going to lose in a horrific way. Continuing to pull the trigger until the gun fires is the worst kind of "deliberate indifference."

Respectfully Submitted:

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Attorney for petitioner,
Gerald Burge

(Any footnotes trail the end of each document)

No. 01-31017

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GERALD BURGE,
Plaintiff-Appellee-Cross-Appellant,

versus

ST. TAMMANY PARISH; ET AL,
Defendants,

RODNEY JACK STRAIN,
Sheriff of St. Tammany Parish,
Defendant-Appellant-Cross-Appellee.

GERALD BURGE,
Plaintiff-Appellee-Cross-Appellant,

versus

PATRICK CANULETTE, ETC.; ET AL,
Defendants,

DEBRA MCCORMICK,
Defendant-Cross-Appellee.

June 25, 2003, Filed

COUNSEL: For GERALD BURGE, Plaintiff - Appellee-Cross-Appellant: Mark William Smith, Metairie, LA.

For RODNEY STRAIN, Sheriff of St Tammany Parish, Defendant - Appellant-Cross-Appellee: Margaret H Kern, Jones, Fussell, Buras, Schoen, Kern & Crain, Covington, LA. Franz L Zibilich, Martiney & Caracci, Metairie, LA.

JUDGES: Before GARWOOD, JONES, and STEWART, Circuit Judges.

OPINIONBY: GARWOOD

OPINION: GARWOOD, Circuit Judge:

Appellant Rodney Jack Strain, the Sheriff of St. Tammany Parish, Louisiana, appeals the entry of judgment against him in his official capacity, under 42 U.S.C. § 1983, for depriving the appellee, Gerald Burge, of his right to a fair trial. Burge cross-appeals the dismissal of his state-law tort claim against Sheriff Strain for spoliation of evidence. We reverse the entry of judgment against Sheriff Strain and affirm the dismissal of Burge's state tort claim.

Facts and Proceedings Below

In June of 1991, the appellee, Gerald Burge, brought suit under section 1983 against a litany of defendants, including the then sheriff of St. Tammany Parish, Patrick Canulette, for the deprivation of his constitutional rights to due process and a fair trial. Since its filing in 1991, Gerald Burge's section 1983 claim has come before this court on appeal on three separate occasions. It is before us now for the fourth.

A. Factual Background

The general origins of the present appeal lie in a bizarre concatenation of circumstances beginning, over twenty years ago, with the discovery of the body of Douglas Frierson under a bridge in St. Tammany Parish, Louisiana. The details of those circumstances, however, are described at length in two prior published opinions, Burge v. Parish of St. Tammany, 996 F.2d 786 (5th Cir. 1993) (Burge I), and Burge v. Parish of St. Tammany, 187 F.3d 452 (5th Cir. 1999) (Burge III), and for brevity's sake we set forth here only an abbreviated version of the factual history narrated at length in Burge III.

Sometime between midnight and four o'clock a.m. on October 17, 1980, Douglas Frierson was shot to death and his body abandoned beneath a bridge in St. Tammany Parish. That same day, the Chief of Detectives of the St. Tammany Parish Sheriff's Office, Lieutenant E.L. Hermann Jr., assigned two Sheriff's Office detectives, Gary Hale and Clark Thomas, to investigate Frierson's murder.

In the course of the ensuing investigation, Detective Hale took a number of statements from various individuals, the most important of which for the purposes of the present appeal was a statement taken from Douglas Frierson's mother, Jean Frierson. In her first statement to Hale, taken on October 17, 1980, Jean Frierson reported that at midnight on the night of his murder, Douglas Frierson came to her home where she served him a meal of pancakes. She told Hale that after he had finished eating, Douglas Frierson had been picked up at her house by someone in a car, but that she

saw neither the vehicle nor the person or persons who came to pick up her son.

Gerald Burge and Joe Pearson were eventually indicted for the murder of Douglas Frierson. In April of 1984, Burge's counsel filed a Brady motion requesting that the St. Tammany Parish District Attorney's Office, then headed by District Attorney Marion Farmer, deliver to him all exculpatory evidence in the state's possession. The District Attorney's Office responded, and certain documents were delivered to Burge's counsel; those documents, however, did not include the October 17th statement of Jean Frierson to Gary Hale in which she reported that she could not identify the person or persons with whom her son departed on the night of his murder.

In January of 1985, and before Burge's murder charge went to trial, Walter Reed replaced Marion Farmer as District Attorney for St. Tammany Parish. In preparing to bring Burge's case to trial, however, the new administration discovered that its copy of the Sheriff's investigatory file was missing. Accordingly, the District Attorney began the process of reconstructing its file and requested that a second copy of the Sheriff's original investigatory file be delivered for use at trial. A copy of that file was delivered to the District Attorney's Office. However, according to the testimony of the prosecuting attorney in the case, Paul Katz, the copy of the file delivered by the Sheriff's Office in 1985 also did not contain Jean Frierson's October 17th statement.

At Burge's trial, Jean Frierson testified in a manner contradictory to her original statement to Gary Hale.

Specifically, Jean Frierson testified that she saw her son leave with Gerald Burge on the night of the murder. Without the benefit of her original statement to Detective Hale, Burge's counsel was unable to sufficiently impeach Jean Frierson's testimony, and in September, 1986, Burge was convicted for the murder of Douglas Frierson.

According to the record in the present case, the existence of the original Jean Frierson statement eventually came to the attention of Burge's counsel, in part, through the efforts of Lieutenant Hermann of the St. Tammany Parish Sheriff's Office. According to Lt. Hermann's testimony in the present case, immediately after Burge's 1986 trial for Frierson's murder, Detective Hale approached Lt. Hermann to discuss the recent trial. Hermann testified that during the course of his conversation with Hale, Hale showed Lt. Hermann certain documents relating to the original murder investigation that Hale had stored in the trunk of his car, including certain original documents that Lt. Hermann believed should have been delivered to the District Attorney's Office. When Lt. Hermann asked Hale why the documents were in his car, Hale reportedly replied, "If I would have turned this in, it would have caused us to lose--it could have caused us to lose the case."

In 1990, after evidence of Jean Frierson's original statement came to light, and four years after his original conviction, Burge filed for and was granted state post-conviction relief on the grounds that Jean Frierson's original October 17th statement was exculpatory evidence that should have been produced for the defense under the rule of Brady v. Maryland,

373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Upon obtaining state post-conviction relief, Burge was tried a second time for Douglas Frierson's murder and in 1992 was acquitted of all charges.

B. Procedural History

The procedural history of the present appeal is even more anfractuous than its factual background. Burge filed this section 1983 action in 1991, claiming that members of the Sheriff's Office and the District Attorney's Office had conspired to deprive him of the right to a fair trial by suppressing Jean Frierson's October 17th statement. His initial complaint named as defendants Sheriff Patrick Canulette individually, the St. Tammany Parish Sheriff's Office, Detective Gary Hale, the St. Tammany Parish District Attorney's Office, District Attorney Walter Reed individually, and special prosecutor Paul Katz. After three detours to this court, however, see Burge v. Parish of St. Tammany, 996 F.2d 786 (5th Cir. 1993) (Burge I), Burge v. St. Tammany Parish Sheriff's Office, No. 97-00044 (5th Cir. Apr. 14, 1997) (Burge II) (unpublished), Burge v. Parish of St. Tammany, 187 F.3d 452 (5th Cir. 1999) (Burge III), only Gary Hale and Sheriff Patrick Canulette, in his official capacity, remained as defendants in Burge's original action. n1

On January 1, 1996, Burge filed a second action against the Sheriff and Captain Debra McCormick asserting a state-law claim for spoliation of evidence. That suit was consolidated with Burge's original suit in February, 1996, and on June 22, 2000, the district court issued an order granting summary judgment on Burge's spoliation of evidence claim to the defendants, Captain

McCormick and Sheriff Strain. Trial on Burge's remaining original claims from his 1991 civil rights suit began on May 7, 2001, and on May 21 a jury returned a verdict in favor of Burge on his section 1983 claim against both Sheriff Strain and Gary Hale. Sheriff Strain moved for judgment as a matter of law at the close of the plaintiff's case-in-chief, at the close of all the evidence, and again after the entry of judgment against him.

Sheriff Strain now appeals both the denial of his motions for judgment as a matter of law as well as two evidentiary rulings of the district court. Burge cross-appeals the grant of summary judgment on his spoliation of evidence claim.

Discussion

A. Section 1983

1. Deliberate Indifference: Pattern of Violations

We review de novo the district court's ruling on Sheriff Strain's motion for judgment as a matter of law. Judgment as a matter of law is proper where "there is no legally sufficient evidentiary basis for a reasonable jury to find for [a] party on [an] issue." FED. R. CIV. P. 50(a)(1). Reviewing all the evidence in the record, we draw "all reasonable inferences and resolve all credibility determinations in the light most favorable to the non-moving party," Miss. Chemical Corp. v. Dresser-Rand Co., 287 F.3d 359, 365 (5th Cir. 2002), and will reverse "only if no reasonable jury could have arrived at the verdict." Id.

Liability under section 1983 attaches where a deprivation of a right protected by the Constitution or by federal law is caused by an official policy. An official policy can be found in two forms:"1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or

2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy." Bennett v. City of Slidell, 735 F.2d 861, 862 (5th Cir. 1984) (per curiam).A claim of a violation of section 1983 pursuant to the latter form of official policy--a persistent, widespread practice of city officials or employers--may in an appropriate case also encompass allegations that a policymaker failed to act affirmatively, including a failure adequately to train a subordinate.

According to Burge, the records-keeping practices at the Sheriff's Office caused the Brady violation he suffered in his first trial insofar as those procedures permitted certain statements, including Jean Frierson's exculpatory statement, to be omitted from the copy of the investigatory file that was sent from the Sheriff to the District Attorney's Office before Burge's 1986 trial. Specifically, Burge maintains that the constitutional violation he suffered resulted from two claimed deficiencies in the St. Tammany Parish Sheriff's Office, namely: (1) an alleged longstanding practice of failing to deliver all material information uncovered during the course of an investigation to the District Attorney; and

(2) assertedly inadequate training in the maintenance and transfer of sheriff's records.

Knowledge on the part of a policymaker that a constitutional violation will most likely result from a given official custom or policy is a sine qua non of municipal liability under section 1983. n2 Thus, for municipal liability to attach under section 1983 a plaintiff must demonstrate "actual or constructive knowledge of such custom . . . attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority." Bennett v. City of Slidell, 728 F.2d 762, 762 (5th Cir. 1984). Where an official policy or practice is unconstitutional on its face, it necessarily follows that a policymaker was not only aware of the specific policy, but was also aware that a constitutional violation will most likely occur. See Piotrowski v. City of Houston, 237 F.3d 567, 579 (5th Cir. 2001). Where, however, as in the present case, an alleged policy or custom is facially innocuous, establishing the requisite official knowledge requires that a plaintiff establish that an official policy was "promulgated with deliberate indifference to the 'known or obvious consequences' that constitutional violations would result." Id. at 579.

The knowledge requirement applies with equal force where a section 1983 claim is premised on a failure to train or to act affirmatively. Thus, an official is liable under section 1983 for a failure to train only where the plaintiff establishes that: "(1) the [official] failed to train or supervise the officers involved; (2) there is a causal connection between the alleged failure to supervise or train and the alleged violation of the plaintiff's rights; and (3) the failure to train or supervise constituted

deliberate indifference to the plaintiff's constitutional rights." Thompson v. Upshur County, 245 F.3d 447, 459 (5th Cir. 2001); see also City of Canton v. Harris, 489 U.S. 378, 109 S. Ct. 1197, 1204, 103 L. Ed. 2d 412 (1989) ("The inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.").

Both of Burge's theories, therefore, required proof of deliberate indifference. And just as proof of a custom or practice requires more than a showing of isolated acts, proof of deliberate indifference, generally requires a showing "of more than a single instance of the lack of training or supervision causing a violation of constitutional rights." Thompson, 245 F.3d at 459. Rather, deliberate indifference generally requires that a plaintiff demonstrate "at least a pattern of similar violations" arising from training that is so clearly inadequate as to be "obviously likely to result in a constitutional violation." Id.

There is no question in this case that the Sheriff of St. Tammany Parish is a final policymaker or that Burge suffered a Brady violation in his original trial and conviction for the 1980 murder of Douglas Frierson. And although it is disputed whether the evidence suffices to show that the Sheriff's Office, rather than the District Attorney's, was responsible for the loss of the key statements before Burge's 1986 criminal trial, we assume for present purposes that the evidence suffices to show that, as Burge asserts, the Sheriff's Office failed to transfer the entire investigatory file to the District Attorney and that such failure was the cause of the Brady violation. The issue on appeal is thus

narrowed to whether Burge presented sufficient evidence to establish knowledge or deliberate indifference to the likelihood of a constitutional violation on the part of the Sheriff. We conclude that he did not.

Burge maintains that three pieces of evidence presented at trial were sufficient to establish a pattern or practice of constitutional violations from which a jury could infer that the Sheriff had been deliberately indifferent to Burge's constitutional rights. First, Burge relies on the testimony of Mario Arthur, an investigator with the St. Tammany Parish District Attorney's Office at the time of Burge's first murder trial. Arthur testified that, at times, he had experienced difficulties in receiving supplemental reports from the Sheriff's Office. Specifically, Arthur testified that if the Sheriff's Office created supplemental reports in a case after the original investigatory file had been transferred to the District Attorney's Office, copies of those reports were not always automatically delivered to the District Attorney and that he could obtain them, therefore, only by specific request. Arthur also testified that if a file contained no indication that a supplemental report had been filed, he would not necessarily know to request the supplemental reports. Second, Burge points to the testimony of Walter Reed, the St. Tammany Parish District Attorney at the time of Burge's 1986 trial. Reed testified that in isolated cases the District Attorney's Office either might not be able to locate documents or might discover that the Sheriff's Office had not delivered certain documents. Finally, Burge relies on evidence that the Sheriff did not have a practice of maintaining a log documenting which statements had been delivered to the District Attorney.

This evidence, whether considered individually or taken as a whole, however, is not sufficient to establish deliberate indifference or knowledge on the part of the Sheriff that a Brady violation would be a highly likely consequence of the manner in which his office managed its records or transferred those records to the District Attorney. Cf. Brown v. Bryan County, OK, 219 F.3d 450, 461 (5th Cir. 2000). To prevail on a Brady claim, a defendant must "demonstrate that: (1) the prosecution suppressed evidence; (2) the evidence was favorable to him; and (3) the evidence was 'material either to guilt or punishment.'" Vega v. Johnson, 149 F.3d 354, 363 (5th Cir. 1998) (quoting Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215, (1963)). Evidence that the District Attorney's Office occasionally had to request documents from the Sheriff does not establish that documents were eventually withheld from a defendant any more than evidence that documents may be difficult to find or that documents are occasionally misplaced establishes a pattern of failing to disclose exculpatory evidence. District Attorney Reed's and Mario Arthur's testimony establishes, at best, only the first two prongs of a Brady claim; their testimony does not demonstrate that any given document was ever actually withheld from a defendant, let alone that any given document that might have been withheld was actually material to a specific defendant's guilt or punishment. Moreover, neither Arthur nor Reed were able to identify any other case where materials gathered by the Sheriff were withheld from the District Attorney.

Burge's contention that the Sheriff's failure to maintain a log of all documents sent to the District Attorney's Office establishes deliberate indifference also fails.

Where it was the Sheriff's policy to transfer copies of all documents in his possession to the District Attorney, the importance of a log is not altogether clear. n3 Moreover, even if Burge is correct that maintaining such a log might have been an effective policy measure, its absence does not rise to the level of deliberate indifference. Debra McCormick, the Sheriff's deputy in charge of maintaining records, did testify that she had received no formal records-keeping training. McCormick also testified, however, that she had received on-the-job training, and Burge presented no evidence tending to show that such on-the-job training was inadequate, nor did he present evidence of any specific additional training that McCormick or the employees of the Sheriff's records room should have received. Cf. Pineda v. City of Houston, 291 F.3d 325, 333 (5th Cir. 2002). In addition, Burge failed to demonstrate that McCormick, or any other records-room employee, was unaware of the importance of delivering all investigatory materials to the District Attorney. Cf. Pineda, 291 F.3d at 333 (noting that a plaintiff had failed to show that police officers were so untrained as to be unaware that certain warrantless searches violated the Fourth Amendment). On the contrary, McCormick testified that she was familiar with the importance of delivering all evidence to the District Attorney.

Finally, in an attempt to establish a pattern of Brady violations, Burge refers, for the first time on appeal, to two cases arising out of St. Tammany Parish that involved a Brady violation: Faulkner v. Cain, 133 F. Supp. 2d 449 (E.D. La. 2001), and Kirkpatrick v. Whitley, 992 F.2d 491 (5th Cir. 1993). These cases, however, dealt with Brady violations caused by the St.

Tammany Parish District Attorney's Office, not by the Sheriff's Department, and they are, therefore, insufficient to demonstrate deliberate indifference on the part of the Sheriff. Moreover, even if these cases were adequate to establish a pattern of constitutional violations sufficient to show deliberate indifference, they constitute evidence that was not submitted to the jury and that we may not, therefore, consider for the first time on appeal. See Theriot v. Parish of Jefferson, 185 F.3d 477, 491 n.26 (5th Cir. 1999) ("An appellate court may not consider new evidence furnished for the first time on appeal . . . ."). n4

After thorough review of the record, we conclude that Burge failed to present sufficient evidence to impose section 1983 liability on the Sheriff.

2. Deliberate Indifference: Single-Incident Exception

Burge, however, also argues that even if the evidence is insufficient to establish a pattern of constitutional violations, the jury verdict in his favor should be upheld on the grounds that his case falls within the single-incident exception of Brown v. Bryan County, 219 F.3d 450 (5th Cir. 2000), pet. for reh'g en banc denied, 235 F.3d 944 (5th Cir. 2000). That exception recognizes that in a limited set of cases, a plaintiff, unable to show a pattern of constitutional violations, may establish deliberate indifference by "showing a single incident with proof of the possibility of recurring situations that present an obvious potential for violation of constitutional rights." McClendon v. City of Columbia, 258 F.3d 432, 442 (5th Cir. 2001).

The single incident exception, however, is a narrow one, and one that we have been reluctant to expand. See Pineda v. City of Houston, 291 F.3d 325, 334-35 (5th Cir. 2002) ("Charged to administer a regime without respondeat superior, we necessarily have been wary of finding municipal liability on the basis of [the single-incident] exception for a failure to train claim."). Accordingly, the exception will apply only where the facts giving rise to the violation are such that it should have been apparent to the policymaker that a constitutional violation was the highly predictable consequence of a particular policy or failure to train. See Bryan County, 219 F.3d at 461.

It is not reasonably inferable from the evidence in this case that a Brady violation was a highly probable consequence of the Sheriff's policies. Unlike the facts of Bryan County, there is no evidence in the present case that the employees of the Sheriff's records room had a reputation for recklessness, or that the on-the-job training those employees received was inadequate. Nor do we accept Burge's argument that the single-incident exception should be expanded based on the latent nature of a Brady claim. The frequency with which defendants' assert Brady violations belies Burge's claim that Brady violations are inordinately difficult to discover. See, e.g., Richard A. Rosen, Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger, 65 N.C. L. REV. 693, 738 (1987) (noting that "although there are certainly many cases in which Brady-type misconduct is not uncovered, the motivation for a criminal defendant to challenge a conviction on due process grounds and the large number of these cases actually litigated ensure that there is a significant possibility that the misconduct will

be discovered"). We decline, therefore, to extend the single-incident exception to the present case, and Burge is accordingly left with the burden of showing deliberate indifference by establishing proof of a pattern of similar violations, a burden he has been unable to carry. See supra Part II(A)(2).

Because Burge failed to establish the existence of a single prior Brady violation, let alone demonstrate a pattern of similar Brady violations sufficient to demonstrate deliberate indifference on the part of the Sheriff, we find that no reasonable jury could have concluded that Sheriff Strain in his official capacity was deliberately indifferent to Burge's right to a fair trial. Accordingly, we reverse the judgment against Sheriff Strain and therefore do not reach the remainder of the Sheriff's arguments on appeal.

B. Spoliation of Evidence

On his cross-appeal, Burge challenges the dismissal on summary judgment of his state-law spoliation of evidence claim against Sheriff Strain and Debra McCormick. Between 1991, the date of the filing of Burge's civil suit, and 1995, the original paper copy of the Frierson murder investigatory file was destroyed as part of a routine purging of old files. Well before the purging process began and unrelated to it, the complete original file was produced in the state district court in June 1990 and was copied by the Sheriff's Office for the District Attorney in 1990. The District Attorney then made a copy of his copy and provided it to Burge. The counsel for the Sheriff's Office had a copy of the original file made and provided it to plaintiff's counsel in 1991. The Sheriff's Office photographed the entire original

file on microfilm and made a duplicate of the microfilm, both of which remain in the Sheriff's Office, a copy of each having been furnished plaintiff's counsel. Burge has pointed to nothing missing from any of these copies.

Burge maintains, without reasoned explanation or evidentiary support, that because of lack of access to the original file, he is unable to establish not only exactly which documents were not delivered to the District Attorney's Office in 1986, but also who, besides Detective Hale, might have been responsible for the omission of certain statements from the copy of the file that was made for the District Attorney in 1986.

We review a grant of summary judgment de novo. Young v. Equifax Credit Info. Servs. Inc., 294 F.3d 631, 635 (5th Cir. 2002). "Summary judgment is proper if, after adequate opportunity for discovery, the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits filed in support of the motion, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Id. The moving party bears the burden of pointing to an absence of evidence to support the nonmoving party's case, Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986), and we will uphold a grant of summary judgment where the nonmovant is unable, in turn, to point to any evidence in the record that would sustain a finding in the nonmovant's favor on any issue on which he bears the burden of proof at trial. Id. at 2552-53.

The Louisiana tort of spoliation of evidence provides a cause of action for an intentional destruction of evidence carried out for the purpose of depriving an

opposing party of its use. Pham v. Contico Int'l, Inc., 759 So. 2d 880 (La. App. 5 Cir. 3/22/00). n5 After reviewing the summary judgment record we agree with the district court's conclusion that Burge presented no evidence that the Sheriff intentionally destroyed the original file for the purpose of depriving Burge of its use. See Pham, 759 So. 2d at 883-84 (holding that intent is a necessary element of a claim for spoliation of evidence). Burge cites no evidence, either in his memorandum in opposition to the defendants' motion for summary judgment or in his brief on appeal, tending to show that the Sheriff's Office intentionally destroyed the Frierson murder file for such a purpose. Nor is there any evidence of any harm to Burge. We conclude that the district court correctly granted the defendants' motion for summary judgment on Burge's spoliation of evidence claim.

Conclusion

For the foregoing reasons, we REVERSE the district court's entry of judgment against Sheriff Strain in his official capacity and AFFIRM the grant of summary judgment on Burge's state-law spoliation of evidence claim.

REVERSED IN PART;

AFFIRMED IN PART.

FOOTNOTES

n1 On remand from Burge III, Rodney Strain, the new sheriff of St. Tammany Parish, was substituted as a defendant for the previous sheriff, Patrick Canulette.

n2 The requirement that a policymaker be charged with actual or constructive knowledge of the policy that inflicts the alleged injury follows from the principle that respondeat superior is unavailable against a municipality under § 1983. See Pineda v. City of Houston, 291 F.3d 325, 328 (5th Cir. 2002).

n3 Multiple witnesses testified that it was the practice and policy of the Sheriff's Office to deliver all investigatory documents, materials and evidence in its possession to the District Attorney. No Sheriff's Office employee testified that they did not understand this to be the office policy and practice; no witness testified that there was any other or contrary policy or practice; no witness testified that Sheriff's Office employees, or any of them, were or considered themselves to be free to do otherwise or to withhold such documents, materials or evidence from the District Attorney.

n4 We also note that the Cain case was tried in the Eastern District of Louisiana, as was the instant case, and the opinion in Cain was handed down approximately three months before trial commenced in the instant case. This court's opinion in the Whitley case was handed down approximately eight years before trial in the case at bar.

n5 Burge attempts to show, relying on Guillory v. Dillard's Dep't Store, Inc., 777 So. 2d 1 (La. App. 3 Cir. 10/11/00), that the tort of spoliation of evidence may also be based on the negligent destruction of evidence. The language in Guillory upon which Burge relies, however, is dicta, and does not support the proposition that a spoliation claim can be grounded in negligence.

CIVIL ACTION NO. 91-2321,
SECTION: E/3

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA

GERALD BURGE

v.

PARISH OF ST. TAMMANY, et al

January 15, 1992, Decided
January 15, 1992, Filed, and
January 16, 1992, Entered

OPINIONBY: MARCEL LIVAUDAIS, JR.

OPINION:

ORDER AND REASONS

Three of the defendants herein, the St. Tammany Parish District Attorney's Office, Walter P. Reed, and Paul Katz (hereinafter collectively "the prosecutors") have filed a motion to dismiss the plaintiff's complaint against them for failure to state a claim and for prosecutorial immunity, and to abstain. Plaintiff Gerald Burge opposes this motion.

The plaintiff claims in his amended complaint that the prosecutors are liable to him under 42 U.S.C. § 1983 for directing the St. Tammany Parish Deputy Sheriffs investigating the murder of Douglas Frierson to store the investigation file in the trunk of a detective's car

leading to the disappearance of the exculpatory statements. The prosecutors argue that even if plaintiff can prove the allegations, they cannot be held liable for § 1983 violations due to prosecutorial immunity.

The Supreme Court determined in Imbler v. Pachtman, 424 U.S. 409, 431, 96 S.Ct. 984, 995 (1976) that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983." As synopsized by the Court in Burns v. Reed, U.S. , 111 S.Ct. 1934 (1991):

The [Imbler] Court therefore held that prosecutors are absolutely immune from liability under § 1983 for their conduct in 'initiating a prosecution and in presenting the State's case," [citation omitted] insofar as that conduct is 'intimately associated with the judicial phase of the criminal process,' [citation omitted]. Each of the charges against the prosecutor in Imbler involved conduct having that association, including the alleged knowing use of false testimony at trial and alleged deliberate suppression of exculpatory evidence. The Court expressly declined to decide whether absolute immunity extend to 'those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of an advocate.' [citation omitted] It was recognized, though, that 'the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart form the courtroom.' [citation omitted]

111 S.Ct. at 1939.

Thus, the Imbler decision expressly held that a prosecutor was immune from suit in instances when the conduct alleged is the deliberate use of false testimony at trial and the deliberate suppression of an exculpatory statement. These are precisely the allegations being made by the plaintiff in this complaint. His attempts to cast the prosecutor's actions in the light of that of an investigative officer do not alter their character nor do they distinguish this factual scenario from that presented in Imbler. See, Henzel v. Gerstein, 608 F.2d 654, 657 (5th Cir. 1979).

Plaintiff further suggests that the opinion of Hafer v. Melo, U.S. , 60 U.S.L.W. 4001 (November 5, 1991), somehow alters the prosecutorial immunity established in Imbler. A review of that opinion reveals that it holds that state officials are amenable to suit in their individual capacities for official acts under § 1983. Whether or not those official acts are protected by immunity is not addressed by Hafer as the question in that case concerns acts by the Auditor General of Pennsylvania, not a state prosecutor.

Accordingly, for the above and foregoing reasons,

IT IS ORDERED that the motion of defendants St. Tammany Parish District Attorney's Office, Walter P. Reed, and Paul Katz, to dismiss be and is hereby GRANTED.

New Orleans, Louisiana,
January 15, 1992.

MARCEL LIVAUDAIS, JR.,
United States District Judge

No. 01-31017

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BURGE,
Plaintiff - Appellee - Cross-Appellant

v.

ST. TAMMANY PARISH; ET AL,
Defendants;

RODNEY JACK STRAIN,
Sheriff of St. Tammany Parish,
Defendant - Appellant - Cross-Appellee;

GERALD BURGE,
Plaintiff - Appellee - Cross-Appellant

v.

PATRICK CANULETTE, Etc.; ET AL.,
Defendants;

DEBRA MCCORMICK,
Defendant - Cross-Appellee

August 8, 2003 Filed

JUDGES: Before GARWOOD, JONES, and STEWART, Circuit Judges.

OPINIONBY: Will Garwood

OPINION: ON PETITION FOR REHEARING

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

Will Garwood
United States Circuit Judge

No. 97-30241

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GERALD BURGE,
Plaintiff-Appellee-Appellant,

v.

ST. TAMMANY, PARISH OF, ET AL.;
Defendants,

ST. TAMMANY PARISH DISTRICT ATTORNEY'S OFFICE; WALTER REED,
Defendants-Appellees,

and PATRICK J. CANULETTE, Sheriff, in his official capacity as Sheriff of the Parish of St. Tammany;
GARY HALE,
Defendants-Appellants.

GERALD BURGE,
Plaintiff-Appellee,

v.

PATRICK CANULETTE, in his official capacity as Sheriff of the Parish of St. Tammany, et al.,
Defendants,

PATRICK CANULETTE, in his official capacity as Sheriff of St. Tammany,
Defendant-Appellant.

August 25, 1999, Decided

COUNSEL: For GERALD BURGE, Plaintiff - Appellee: Mark William Smith, Metairie, LA.

For PATRICK J CANULETTE, GARY HALE, Defendant - Appellants: Clare W Trinchard, Leigh Ann Schell, Trinchard & Trinchard, New Orleans, LA.

JUDGES: Before DAVIS, JONES, and DENNIS, Circuit Judges.*

OPINION BY: DENNIS

OPINION: DENNIS, Circuit Judge:

Plaintiff Gerald Burge ("Burge") was imprisoned for nearly five years for a crime of which he was later exonerated. In 1986, a sheriff's deputy allegedly facilitated Burge's conviction of the second degree murder of Douglas Frierson ("Frierson") in St. Tammany Parish, Louisiana, by suppressing a pretrial statement by the victim's mother that would have impeached her perjured testimony that she saw Frierson leave her house with Burge shortly before the homicide. After that statement and other suppressed exculpatory evidence came to light, Burge was granted a new trial and acquitted by a jury in 1992.

Burge brought civil actions for damages in the United States District Court against the District Attorney and the Sheriff of St. Tammany Parish, Louisiana, and a number of assistant district attorneys and sheriff's deputies, under 42 U.S.C. § 1983, the Louisiana Constitution, and state tort law. The gravamen of these

actions is that the suppression of exculpatory evidence in violation of Burge's constitutional right to due process was caused by: (1) the deliberately indifferent policies and customs of the Sheriff and the District Attorney, in their official capacities, regarding the supervision and training of employees in the handling of exculpatory evidence; and (2) the intentional acts and omissions of their individual deputies and assistants in the introduction of false evidence and suppression of exculpatory evidence.

The present appeals arise from motions for summary filed by the defendants in Burge's civil action. The district court granted them in part and denied them in part. Burge and several of the defendants appealed from a number of the district court's rulings that were adverse to them.

I. FACTUAL BACKGROUND

At approximately 4:13 a.m. on October 17, 1980, the body of Douglas Frierson was found under a bridge in St. Tammany Parish. He had been shot to death in the abdomen, shoulder, and head with a large caliber weapon. It appeared that he had been killed only an hour or so before his corpse was found. When Glenda Frierson ("Glenda"), the victim's sister, was informed of her brother's death, she related the news by telephone to his friend, Gerald Burge. Burge called the St. Tammany Parish Sheriff's Office (the "Sheriff's Office") at about 8:30 a.m., verified the report, and told Chief of Detectives E.L. Hermann, Jr. ("Lt. Hermann") that on the night of the murder Frierson had visited his home and departed at about midnight on foot. Lt. Hermann assigned Detective Gary Hale ("Hale"), who had

inspected the murder scene and the victim's body soon after its discovery, to investigate the murder.

A. The Murder Investigation and The Allegedly Withheld Exculpatory Evidence

On October 17, 1980, Hale took a recorded statement (later transcribed) of Mrs. Jean Frierson ("Mrs. Frierson"), the victim's mother. Mrs. Frierson told Hale that her son ate pancakes at her home in Picayune, Mississippi at about midnight on October 16, 1980 and that at approximately 12:50 a.m. on October 17, 1980 Frierson was picked up by someone in a car. Mrs. Frierson said that she did not see the vehicle or the person or persons with whom her son left.

On October 17, 1980, Hale also took a recorded statement from Frierson's 12-year-old brother, Ricky Frierson ("Ricky"), who told Hale that at approximately 12:50 a.m. on October 17, he saw Burge and Joe Pearson ("Pearson") drive up to Mrs. Frierson's residence in Burge's red Cadillac with a white top. Although Ricky said that he did not see his brother get in the car, he told Hale that he saw Frierson sitting in the back seat of the vehicle as it drove away.

On October 18, 1980, Hale interviewed Pearson, who said that he did not leave his home on October 16 or 17, and that his girlfriend, Jo Ella Prestwood ("Prestwood"), could confirm his whereabouts at the time of Frierson's murder.

On October 21, 1980, Hale interviewed Burge, who said that on the night of the murder he picked up Frierson at his mother's home in Burge's red and white Cadillac

and that he dropped off Frierson at a convenience store between 11:30 p.m. and 12:30 a.m. This second statement was partially inconsistent with Burge's first statement in which he said Frierson left his house at midnight on foot. Burge also told Hale that although he had a Ruger Blackhawk .44 magnum weapon, he had given Frierson the .44-caliber gun to sell approximately one week before the murder. In October 1980, an officer from the New Orleans Police Department, where the autopsy was performed, told Hale that the bullets taken from Frierson's body probably were fired from a Ruger Blackhawk .44-caliber weapon.

On October 22, 1980 Hale interviewed Bernice Frierson ("Bernice"), the victim's brother, who stated that on October 13 he saw Burge with a .44-caliber weapon, and that Burge told him that he would kill anyone before he would go to jail. Bernice also said that on this date Burge told him that he and Pearson had quarreled over money that Pearson owed Frierson from a drug deal, and that Burge later told him that he had picked up Frierson on the night of the murder because Frierson wanted to make a phone call.

On October 24, 1980, based on an arrest warrant supported by the sworn affidavit of Hale, Burge was arrested for the murder of Frierson. Burge was released one week later when the District Attorney's Office decided not to prosecute for lack of sufficient evidence.

At some time during the murder investigation, Hale also prepared an undated final resume. In this report, Hale disclosed that when Burge called Lt. Hermann on the morning Frierson's body was found, Burge did not

ask "where the victim was found or how the victim was killed or what time the victim was discovered." Hale also referred to a second interview with Ricky Frierson on October 23, 1980. In this later interview, Ricky stated that Burge told Ricky that he must have been "mistaken" when he told Hale that he saw Burge and Pearson pick up Frierson on the night of the murder; and that the third person in the car actually was an unnamed woman. The resume also reflects that Hale had obtained a written statement from Sgt. B. Smith of the Picayune Police Department indicating that at 12:45 a.m. on October 17, 1980, she saw Frierson at a lounge in Picayune, Mississippi with Johnny Milstead, Paul Johnson, and Bobby Frierson, the victim's cousin. Hale's resume also refers to taped statements from Milstead, Johnson, and Bobby Frierson confirming that they had been drinking with Frierson that night. However, according to the resume, Bobby Frierson told Hale that they took Frierson home at approximately 12:30 a.m.

Hale also prepared an undated handwritten "supplemental report" stating that on April 21, 1981 Detective David Brooks of the Mississippi Highway Patrol told Hale that Rhonda Spears ("Spears") told him that she heard Pearson admit that he had killed Frierson. According to Hale's report, Chief Ladner of the Hancock County, Mississippi Sheriff's Office was present during this conversation. In this handwritten resume, Hale also indicated that he had interviewed a private investigator and a bail bondsman who told him that they had spoken with Prestwood on April 16, 1981, and that she told them that Pearson made "statements which caused her to believe that Pearson and Burge had murdered Frierson."

On April 21, 1981, Hale took a recorded statement from Prestwood, who said that at midnight on the night of the murder, Burge picked up Pearson in his red and white Cadillac and that Pearson returned at approximately 4:00 a.m. Prestwood also told Hale that Pearson told her to tell the police that he had been with her on the night of the murder. She also disclosed that Pearson told her that Frierson had been "ratting" on Burge and him and that he (Pearson) had shot Frierson in the head.

In the summer of 1981, Hale resigned from the St. Tammany Parish Sheriff's Office and became chief investigator and jailer for Pearl River County in Mississippi. Hale left the law enforcement field in late 1983. In 1983, Hale married Glenda Frierson, Frierson's sister, whom he met and began dating during his investigation of her brother's murder.

On November 23, 1983, Detective Mike Moore of the St. Tammany Parish Sheriff's Office, who continued the investigation after Hale's resignation, obtained another recorded statement from Prestwood in which she admitted that she lied when she originally told Hale that Pearson had been with her on the night of Frierson's murder. Prestwood also said that Pearson told her a few days after the murder that Frierson was a "rat" and that he told her "we got his head blown off."

B. Burge's First Murder Trial

While Burge was serving a sentence in a Mississippi prison on an unrelated conviction of receiving stolen property, Pearson confessed to authorities that he and Burge picked up Frierson at midnight on October 16

and drove him to a bridge on Highway 90, where they argued over money and Burge shot Frierson several times. Pearson also stated that Burge threw the gun off Interstate 10 into Lake Pontchartrain.

In 1983, Burge and Pearson were indicted for the second degree murder of Frierson. In April 1984, prior to District Attorney Reed's taking office in January 1985, Burge's attorney filed a Brady motion, requesting any and all exculpatory evidence. n1 In July 1984, Rick Swartz ("Swartz") of the St. Tammany Parish District Attorney's Office (the "District Attorney's Office") produced what he represented to be all of the exculpatory evidence that the Sheriff's Office had turned over to the District Attorney's Office. Later, in April 1994, Swartz gave an affidavit stating that, prior to that Brady production, he "made inquiry into the existence of said exculpatory evidence . . . [and] reviewed the investigatory file provided by the St. Tammany Parish Sheriff's Office and inquired of the St. Tammany Parish Sheriff's Office and of the investigators assigned to the case as to the existence of any exculpatory evidence." In the affidavit, Swartz stated that the October 18 [sic], 1980 statement of Mrs. Frierson to Hale, in which she said that she did not see with whom her son left on the night he was murdered, and Jo Ella Prestwood's April 20, 1981 statement to Hale, in which she said that Pearson admitted to her that he had murdered Frierson, were not part of the investigatory file made available to him by the St. Tammany Parish Sheriff's Office.

Burge's defense attorney at his 1986 murder trial, Wendell Tanner, testified at a 1990 hearing that he had never seen the October 17, 1980 statement of Mrs.

Frierson, the April 1981 and November 1983 statements of Prestwood, or Hale's handwritten resume of his investigation.

In December 1984, the District Attorney reduced the murder charge against Pearson to being an accessory-after-the-fact to the Frierson murder in exchange for Pearson's testimony against Burge. In January 1986, in preparation for Burge's murder trial, the District Attorney's Office discovered that the copy of the Sheriff's investigatory file that had been made from the original investigatory file and delivered to the previous District Attorney in 1980 ("first copy of investigatory file") was missing, and asked the Sheriff's Office for another copy. Captain Debra McCormick ("McCormick"), the chief of records for the St. Tammany Parish Sheriff's Office, testified that because the Sheriff's investigatory file had not been microfilmed by the time of Burge's 1986 trial, she would have made a copy of the file ("second copy of the investigatory file") from the Sheriff's original. In April 1986, District Attorney Walter Reed assigned Paul Katz ("Katz") as Special Assistant District Attorney to prosecute Burge. In a deposition, Katz testified that the second copy of the investigatory file given to the District Attorney's Office by the Sheriff's Office in 1986 did not contain Mrs. Frierson's October 17, 1980 statement and that it included only two of Prestwood's statements. Katz also testified that he could not recall whether the file contained the detectives' resumes of their investigations.

At Burge's first trial for second degree murder in September 1986, Pearson testified that he witnessed Burge fatally shoot Frierson on October 17, 1980. Mrs.

Frierson, contrary to her original October 17, 1980 statement that was not disclosed or produced for the defense, testified that she saw her son leave her house with Burge and Pearson on the night of the murder. Mrs. Frierson also testified that she told Hale that on the morning Frierson's body was found, after Burge called Lt. Hermann in their presence, Burge told her and Glenda detailed information about Frierson's death, i.e., that Frierson's body had been found shot four times with a .44 caliber gun under the East Pearl River bridge. Glenda Frierson Hale, the victim's sister and Hale's wife, testified that Burge had threatened to kill her brother only a few days before the murder, and corroborated Mrs. Frierson's testimony that on the morning after the murder, Burge provided Mrs. Frierson and her with the details of the crime that only a perpetrator would know.

The trial court inspected two statements by Prestwood, and ruled that they were not exculpatory. Prestwood's crucial April 1981 statement that Pearson confessed to being the trigger man was not disclosed and thus was not one of the statements viewed in camera by the court. A jury convicted Burge of the second degree murder of Frierson. The court sentenced Burge to life imprisonment at hard labor without parole.

In a February 1995 affidavit, Lt. Hermann stated that a tape recording he had made of a conversation with Burge after the murder, which Lt. Hermann had given to Hale, had disappeared. According to Lt. Hermann, immediately after Burge's conviction, as he and Hale were leaving the courthouse, Lt. Hermann brought up the subject of the missing tape. Lt. Hermann stated that Hale opened the trunk of his car and showed him

several "reports and statements" pertaining to the Frierson murder investigation. When Lt. Hermann asked Hale why the documents were in his trunk, Hale allegedly told Lt. Hermann that "some of this stuff could probably make us lose the case." Lt. Hermann stated in his affidavit that while he did not look at the documents, he was certain that some of the statements were original transcripts because he saw typewriter indentations in the paper.

According to Lt. Hermann, when he asked Hale how he had gotten Glenda Frierson Hale and Mrs. Frierson to lie on the witness stand, Hale told him, "Over a period of time there is a little brainwashing, you tell them the story of what happened, and what you need to win a case in court and they begin to believe it." In his 1995 affidavit, Lt. Hermann also stated that Hale said that he told prosecutor Katz "about the problem with the case, you know about Jean and Glenda testifying and Katz said he would take care of it."

Lt. Hermann testified that he persuaded Hale to turn over to him the documents in Hale's trunk, and that he allowed Burge's attorney to inspect, but not copy, these documents. After reviewing these documents, Burge's attorney filed a Petition For Post-Conviction Relief in state court alleging that the State unconstitutionally deprived the defense of the following exculpatory evidence: (1) the October 17, 1980 statement of Mrs. Frierson in which she said that she did not see who picked up Frierson the night of the murder; (2) Hale's handwritten supplemental report referring to Detective Brooks's statement that Spears told him that Pearson told her that he had murdered Frierson, and Prestwood's statement that Pearson told her he had

shot Frierson in the head; (3) Hale's final report referring to the statement of Bernice Frierson that two days before the murder, Pearson had given Frierson, the victim, two days to come up with money that he owed Pearson.

When the court granted a hearing on Burge's motion, the District Attorney's Office discovered that the second copy of the investigatory file was missing, and again asked the Sheriff's Office for another copy. Burge's attorney also had a subpoena duces tecum issued to the Sheriff's Office requesting production of Prestwood's April 20, 1981 statement, any statements by Pearson and Glenda Frierson, and any reports or examinations relating to Burge's automobile. Captain McCormick of the Sheriff's Office testified that she could not recall whether she made copies of the investigatory file for the District Attorney's Office ("third copy of the investigatory file") and Burge's attorney ("fourth copy of the investigatory file") from the Sheriff's original or microfilm files.

At a June 1990 evidentiary hearing on Burge's Petition For Post-Conviction Relief, Wendell Tanner, Burge's original defense attorney, testified that despite his request for Brady material in 1986, the District Attorney's Office did not give him Hale's initial resume of his investigation, Prestwood's April 1981 or November 1983 statements, Mrs. Frierson's October 17, 1980 statement, or an evidence receipt showing that Hale had given investigators an envelope containing paint scrapings from a pillar of the bridge near where Frierson's body was found. The trial court granted Burge's Motion for a New Trial based solely on its finding that Mrs. Frierson's October 17, 1980 statement

was exculpatory evidence that constituted Brady material that had been withheld from the defense.

C. Burge's Second Murder Trial and Acquittal

In September 1992, Burge was tried again for the second degree murder of Douglas Frierson. At the second trial, Mrs. Frierson's testimony in the first trial that Burge had picked up her son that night was impeached by the use of her original statement that she had given to Hale on the day of the murder. Thereafter, she admitted on the stand that she had lied when she testified under oath at the 1986 murder trial that she saw her son leave with Burge and Pearson on the night he was murdered. Mrs. Frierson also admitted that she lied at the first trial when she testified that she told Hale that Burge on the morning of Frierson's murder had described to her and Glenda the homicide evidence details after his telephone conversation with Lt. Hermann, although she did not hear him ask for those details. The defense used Prestwood's statements to impeach Pearson's testimony that he saw Burge shoot Frierson. The jury acquitted Burge of all charges.

II. PROCEDURAL HISTORY

In June 1991, Burge filed a civil suit against District Attorney Walter Reed individually, Paul Katz, the St. Tammany Parish District Attorney's Office (collectively the "original DA defendants"); Gary Hale, Sheriff Patrick Canulette individually, and the St. Tammany Parish Sheriff's Office (collectively the "original Sheriff defendants"), for damages for deprivation of his constitutional rights to due process and a fair trial under 42 U.S.C. § 1983 and related statutes by

destroying, concealing, or disposing of certain exculpatory evidence. n2 Burge also alleged a cause of action under § 1983 against the St. Tammany Parish District Attorney's Office and the St. Tammany Parish Sheriff's Office for deficient and substandard policies and practices that allowed the loss of exculpatory evidence in violation of his constitutional rights. Burge alleged no state law claims in the original complaint.

In January 1992, the district court dismissed on the basis of absolute prosecutorial immunity Burge's claim that the original DA defendants directed Hale to "store the investigation file in the trunk of [his] car leading to the disappearance of the exculpatory statements." The district court did not address Burge's claim that deficient and substandard "policies and training" of the District Attorney's Office allowed the loss and/or destruction of exculpatory statements which resulted in the deprivation of Burge's constitutional rights to due process and a fair trial.

The court also dismissed Burge's claims against Hale individually, and Canulette in his official capacity, on the grounds that the claims had been extinguished by prescription. The court did not address Burge's claims against Canulette in his individual capacity. On July 8, 1992, the district court entered a judgment in favor of defendants "Parish of St. Tammany, St. Tammany Parish District Attorney's Office, Walter Reed, Paul Katz, Patrick J. Canulette, in his official capacity as Sheriff of St. Tammany Parish, and Gary Hale," dismissing Burge's complaint with prejudice. Burge's appeal challenged only the dismissal of his claims against Canulette in his official capacity and Hale individually on the grounds of prescription. This court

reversed that judgment. See Burge v. Parish of St. Tammany, 996 F.2d 786 (5th Cir. 1993).

Burge returned to federal court and filed pleadings in the same action re-urging his federal claims against the original DA defendants, adding former St. Tammany Assistant District Attorney Brady Fitzsimmons ("Fitzsimmons") as a defendant, and adding state law claims against all defendants based on malicious prosecution, false imprisonment, infliction of emotional distress, violation of the right to a fair trial under the Louisiana Constitution, and spoliation of evidence.

In March 1994, the district court dismissed Burge's federal claims against the original DA defendants on the basis of res judicata, and dismissed Burge's claims against Fitzsimmons on the basis of absolute prosecutorial immunity. The dismissal order reserved to Burge the right to pursue his state law claims against the original DA defendants and Fitzsimmons.

In May 1995, the St. Tammany Parish District Attorney's Office, Reed, Fitzsimmons and Katz (the "DA defendants") moved for summary judgment solely on Burge's pendent state law claims on the grounds that: (1) the "St. Tammany Parish District Attorney's Office" was entitled to dismissal because it was not a legal entity capable of suing and being sued; (2) the remaining DA defendants in their individual capacities were entitled to absolute prosecutorial immunity under state law; (3) the defendants were entitled to discretionary function immunity under La. Rev. Stat. 9:2798.1; and (4) Burge could not prove the essential elements of his state law claims.

In August 1995, the St. Tammany Parish Sheriff's Office, Canulette in his official capacity; Hale, Deputy Freddie Drennan, Deputy Michael Moore and Deputy Clark Thomas, in their individual capacities, (the "Sheriff defendants"), also moved for summary judgment, arguing that: (1) Burge could not meet his burden of proof on the federal claims; (2) the Sheriff defendants were entitled to absolute prosecutorial immunity because Burge accused them of failing to perform functions traditionally reserved for prosecutors; (3) alternatively, the Sheriff defendants were entitled to qualified immunity because they did not violate any clearly established constitutional guarantees; (4) the Sheriff defendants were entitled to discretionary function immunity under La. Rev. Stat. 9:2798.1; and (5) Burge could not prove the essential elements of his state law claims against the Sheriff defendants. n3

On January 8, 1997, the district court entered its 48-page Order and Reasons. After noting that Burge's federal law claims against the DA defendants already had been dismissed on the basis of prosecutorial immunity, and thereafter on the basis of res judicata, the district court granted the DA defendants' motion for summary judgment on Burge's pendent state law claims on the grounds of absolute prosecutorial immunity. The district court's January 8, 1997 order amended the pleadings instanter, joining Reed in his official capacity as a defendant and realleging all claims asserted against the St. Tammany Parish District Attorney's Office as against Reed in his official capacity.

On March 5, 1997, pursuant to Federal Rule of Civil Procedure 54(b), the district court directed the entry of an amended final judgment in favor of Reed, individually and in his official capacity as the District Attorney for St. Tammany Parish, and in favor of Fitzsimmons and Katz individually, dismissing all of Burge's actions against them.

The district court's January 8, 1997 order denied the motions for summary judgment on Burge's state and federal claims filed by Canulette in his official capacity, and Hale in his individual capacity, and their insurers. The district court certified the order for appeal under 28 U.S.C. § 1292(b). n4 Canulette in his official capacity, Hale in his individual capacity, and their insurer petitioned this court for permission to appeal the ruling as an interlocutory order. A panel of this court denied the petition as to Canulette and the insurer, but ordered that Hale could take an immediate appeal as of right from the district court's rejection of Hale's claim of prosecutorial and qualified immunity with respect to Burge's federal law claims against Hale in his individual capacity. Burge v. St. Tammany Parish Sheriff's Office, No. 97-00044 (5th Cir. Apr. 14, 1997).

Burge appealed from the March 5, 1994 and January 8, 1997 orders dismissing his federal and state law claims against the District Attorney in his official capacity. Burge has stipulated that he has no claims pending against Fitzsimmons, Katz and Reed in their individual capacities. Burge also has conceded that the only issues on appeal with respect to the District Attorney in his official capacity relate to his federal and state law Monell-based claims for deliberate indifference to his

constitutional rights in the training and supervision of personnel with respect to exculpatory evidence.

III. STANDARD OF REVIEW

A district court's decision to grant or deny summary judgment is reviewed de novo, applying the same criteria employed by the trial court in the first instance. Johnson v. Odom, 910 F.2d 1273, 1276-77 (5th Cir. 1990), cert. denied, 499 U.S. 936, 113 L. Ed. 2d 443, 111 S. Ct. 1387 (1991). Summary judgment is proper when the pleadings, depositions, admissions, and answers to interrogatories, together with affidavits, demonstrate that no genuine issue exists as to any material fact and that the movant is entitled to judgment or partial judgment as a matter of law. FED. R. CIV. P. 56(C); Burns v. Harris County Bail Bond Bd., 139 F.3d 513, 517-18 (5th Cir. 1998).

The party seeking summary judgment has the initial responsibility of informing the court of the basis for its motion, and identifying those parts of the record that it believes demonstrate the absence of a genuine issue of material fact. Johnston v. City of Houston, Tex., 14 F.3d 1056, 1060 (5th Cir. 1994) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)). If the moving party carries its initial burden, the burden then falls upon the nonmoving party to demonstrate the existence of a genuine issue of material fact. "This showing requires more than 'some metaphysical doubt as to the material facts.'" Id. (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 584-86, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)). While the party opposing the motion may use proof filed by the movant to satisfy its burden,

"'only evidence -- not argument, not facts in the complaint -- will satisfy'" the burden. Id. (quoting Solo Serve Corp. v. Westowne Assoc., 929 F.2d 160, 164 (5th Cir. 1991)).

This court must "'review the facts drawing all inferences most favorable to the party opposing the motion.'" Evans v. City of Marlin, Tex., 986 F.2d 104, 107 (5th Cir. 1993) (quoting Reid v. State Farm Mut. Auto. Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986)). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. Johnston, 14 F.3d at 1060 (citing Boeing Co. v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc), overruled in part on other grounds, Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331 (5th Cir. 1997) (en banc)).

IV. DISCUSSION

We will divide our discussion into two parts, viz., first, the issues related to Burge's claims against the District Attorney and the Sheriff in their official capacities; and, second, the issues related to Burge's actions against the Deputy Hale in his individual capacity. Burge's actions against Reed and Canulette pertinent to these appeals consist only of claims against these officers in their official, rather than their individual, capacities; whereas, Burge's actions against Hale seek to hold him liable in his individual, rather than his official, capacity. Under each part of the discussion we will address separately the issues raised by Burge's claims under 42 U.S.C. § 1983, the state constitution, and state tort law.

A. Issues Related to Burge's Actions Against the District Attorney and the Sheriff in Their Official Capacities

1. Claims Against the District Attorney In His Official Capacity

(a) Eleventh Amendment Immunity Is Not Applicable To Claims Against District Attorney in Official Capacity

Although the district court was not presented with, and did not address, the issue of Eleventh Amendment immunity, we raised this issue sua sponte at oral argument and the parties were permitted to file supplemental legal authorities with respect to the Eleventh Amendment implications of Burge's claims against Reed in his official capacity as District Attorney for St. Tammany Parish.

"The Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court." Edelman v. Jordan, 415 U.S. 651, 678, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974). See also McDonald v. Board of Miss. Levee Comm'rs, 832 F.2d 901, 906 (5th Cir. 1987) ("Eleventh amendment immunity is a jurisdictional issue that 'cannot be ignored, for a meritorious claim to that immunity deprives the court of subject matter jurisdiction of the action.'"). Under Rule 12(h)(3) of the Federal Rules of Civil Procedure, this court sua sponte may raise the issue of its subject matter jurisdiction.

Therefore, we must inquire whether Burge's federal Monell claim n5 and his pendent state law claims n6

Walter Reed in his official capacity as District Attorney of St. Tammany Parish are barred on the ground that Reed enjoys Eleventh Amendment immunity because the District Attorney's Office is an "arm of the state." See Will v. Michigan Dept. of State Police, 491 U.S. 58, 70, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989).

The question previously has been decided by a panel of this court. The rule in this circuit is that a Louisiana district attorney, sued in his or her official capacity, is a local government official who is not entitled to Eleventh Amendment immunity. Mairena v. Foti, 816 F.2d 1061, 1064 n.1 (5th Cir. 1987), cert. denied, 484 U.S. 1005 (1988); see also Hudson v. City of New Orleans, 174 F.3d 677, 1999 WL 249147, at *3 (5th Cir. 1999) (clarifying why the Eleventh Amendment does not immunize the Orleans Parish District Attorney's Office). It is a firm rule of this circuit that in the absence of an intervening contrary or superseding decision by this court sitting en banc or by the United States Supreme Court, a panel cannot overrule a prior panel's decision. See Billiot v. Puckett, 135 F.3d 311, 316 (5th Cir.), cert. denied, 119 S. Ct. 413 (1998). We are bound by the decision in Mairena because it has not been overruled.

Therefore, Burge's federal and state law claims against Walter Reed in his official capacity as District Attorney for St. Tammany Parish are not barred by the Eleventh Amendment.

(b) The District Court Erred in Dismissing Burge's Official Capacity Suit Against the District Attorney On the Dual Grounds of Absolute Immunity and Res Judicata

The district court granted summary judgment dismissing Burge's action against the District Attorney in his official capacity based on alleged violations of Burge's federal constitutional rights on dual grounds -- absolute prosecutorial immunity and res judicata. We conclude that the District Attorney is not entitled to have the official capacity suit dismissed for either of the grounds used by the district court. Instead, the crucial issues appear to be whether the District Attorney failed to establish adequate policies, procedures or regulations to ensure adequate training and supervision of employees with respect to the government's Brady responsibility; if so, whether the need to control the agents of the government was so obvious, and the inadequacy of the existing practice so likely to result in the violation of constitutional rights, that the District Attorney can reasonably be said to have been deliberately indifferent to the need; and, if so, whether the District Attorney's deliberate indifference and failure to establish such policies, procedures, or regulations caused Burge's constitutional injury.

Official capacity suits generally represent another way of pleading an action against an entity of which an officer is an agent. Monell, 436 U.S. at 691 n.55. Unlike government officials sued in their individual capacities, municipal entities and local governing bodies do not enjoy immunity from suit, either absolute or qualified, under § 1983. Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 166, 122 L. Ed. 2d 517, 113 S. Ct. 1160 (1993). Consequently, the district court erred in granting summary judgment for the District Attorney in his official capacity on the basis of his absolute prosecutorial immunity because

that form of personal or individual immunity is not available in an official capacity suit. See id.

Further, the District Attorney may not have Burge's suit against him in his official capacity dismissed on the grounds of res judicata. The district court's July 8, 1992 order, upon which the prosecutor relies to invoke the doctrine, cannot be so applied because it was not a final judgment. In that order, based on the court's two prior summary judgment orders, the district court entered judgment in favor of the original DA defendants, Hale individually, and Canulette in his official capacity, dismissing Burge's complaint with prejudice. However, the July 1992 summary judgment order did not adjudicate Burge's action against a co-defendant, Canulette in his individual capacity. Moreover, the January 1992 summary judgment order dismissed Burge's claim in his amended complaint that the original DA defendants directed Hale to store exculpatory evidence in the trunk of his car. The court failed to adjudicate Burge's Monell claim against the Sheriff's Office set forth in Burge's original complaint. When, as here, the record clearly indicates that the district court failed to adjudicate the rights and liabilities of all parties, an order cannot be presumed to be final irrespective of the district court's intent. See Witherspoon v. White, 111 F.3d 399, 402 (5th Cir. 1997); Harris v. Rivera Cruz, 20 F.3d 507, 511-12 (1st Cir. 1994) ("We are reluctant to construe a judgment ambiguous on its face as a final judgment where it could plausibly be read as non-final, where extrinsic evidence does not wholly resolve the uncertainty, and where reading it as final could unfairly forfeit the rights of a party.").

We recognize that a decision that fails to adjudicate all rights and liabilities, while not technically final, can be certified as final pursuant to Rule 54(b):When more than one claim for relief is presented in an action, . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.FED. R. CIV. P. 54(b). Because the district court did not make such a determination and direction designating the July 1992 order as a final judgment, the judgment did "not terminate the action as to any of the claims or parties," but remained "subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of the parties." See Lauderdale County Sch. Dist. v. Enterprise Consol. Sch. Dist., 24 F.3d 671, 680 (5th Cir.), cert. denied, 513 U.S. 988, 130 L. Ed. 2d 397, 115 S. Ct. 484 (1994).

Consequently, the district court's July 8, 1992 order was not an appealable final judgment. See Morrison v. City of Baton Rouge, La., 614 F.2d 77, 78 (5th Cir. 1980). Although, in civil cases, a ruling on a motion for partial summary judgment is the law of the case on the issues decided, that ruling is not immutable and has no res judicata effect. United States v. Horton, 622 F.2d 144, 148 (5th Cir. 1980) (citing Travelers Indem. Co. v. Erickson's, Inc., 396 F.2d 134 (5th Cir. 1968)); see also Copeland v. Merrill Lynch & Co., 47 F.3d 1415, 1424 (5th Cir. 1995).

Moreover, the January 1992 district court order granting the District Attorney's motion for summary judgment based on absolute immunity, unlike a denial

of such a motion, is capable of being fully and effectively reviewed after final judgment; therefore, the Cohen collateral judgment doctrine n7 is inapplicable. See Thompson v. Betts, 754 F.2d 1243, 1244 (5th Cir. 1985). Hence, the district court's July 8, 1992 order was an interlocutory order, not a final appealable judgment, and cannot be used to invoke the doctrine of res judicata.

(c) Burge's In Official Capacity Claim Does Not Meet The Requisites Of Monell and Canton

Burge appeals from the summary judgment dismissing his suit against the District Attorney in his official capacity and contends that the district court erred because: (1) Burge's suit against the District Attorney in his official capacity for failure to promulgate appropriate policies and procedures for his office is not subject to a defense of absolute immunity; and (2) based on the evidence of record viewed in the light most favorable to Burge, a reasonable trier of the facts could conclude that the District Attorney in his official capacity is liable to Burge in damages under § 1983 for his constitutional injury due to the Brady violation caused by the District Attorney's failure to promulgate and implement policies, training and procedures to assure that all evidence favorable to an accused obtained by the Sheriff's Office is conveyed to the District Attorney and disclosed to the defense when the evidence is material either to guilt or to punishment. We agree that the District Attorney may not invoke an absolute prosecutorial immunity privilege in an in official capacity suit for the reasons stated in the foregoing section, but we conclude that the summary judgment must be affirmed because the evidence of

record does not reasonably meet the requirements for § 1983 liability under Monell and City of Canton v. Harris.

In Monell, the Supreme Court held that a local government is liable under § 1983 for its policies that cause constitutional torts. Monell, 436 U.S. at 694. These policies may be set by the government's lawmakers, "or by those whose edicts or acts may fairly be said to represent official policy." Id; see McMillian v. Monroe County, Ala., 520 U.S. 781, 784-85, 138 L. Ed. 2d 1, 117 S. Ct. 1734 (1997). "A court's task is to 'identify those officials or governmental bodies who speak with final policymaking authority for the local government actor concerning the action alleged to have caused the particular constitutional [*37] or statutory violation at issue.'" McMillian, 520 U.S. at 784-85 (quoting Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737, 105 L. Ed. 2d 598, 109 S. Ct. 2702 (1989)).

The Supreme Court in McMillian explained that:a suit against a governmental officer "in his official capacity" is the same as a suit '"against [the] entity of which [the] officer is an agent,'" Kentucky v. Graham, 473 U.S. 159, 165, 87 L. Ed. 2d 114, 105 S. Ct. 3099[](1985) (quoting Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 690, n.55, 56 L. Ed. 2d 611, 98 S. Ct. 2018[](1978), and that victory in such an "official-capacity" suit "imposes liability on the entity that [the officer] represents," Brandon v. Holt, 469 U.S. 464, 471, 83 L. Ed. 2d 878, 105 S. Ct. 873 [](1985).McMillian, 520 U.S. at 785 n.2.

The Supreme Court's cases on the liability of local governments under § 1983 instruct us to ask whether

governmental officials are policymakers for the local government in a particular area, or on a particular issue, and that our inquiry is dependent on an analysis of state law. Id. at 786. Cf. Jett, 491 U.S. at 737 ("'Whether a particular official has final policymaking authority' is a question of state law[.]'" (quoting St. Louis v. Praprotnik, 485 U.S. 112, 123, 99 L. Ed. 2d 107, 108 S. Ct. 915 (1988) (plurality opinion)); Pembaur v. City of Cincinnati, 475 U.S. 469, 483, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986) (plurality opinion) (same). "This is not to say that state law can answer the question for us by, for example, simply labeling as a state official an official who clearly makes county policy. But our understanding of the actual function of a governmental official, in a particular area, will necessarily be dependent on the definition of the official's functions under relevant state law." McMillian, 520 U.S. at 786 (citing Regents of Univ. of Cal. v. Doe, 519 U.S. 425, 429 n.5, 137 L. Ed. 2d 55, 117 S. Ct. 900 (1997) ("[The] federal question can be answered only after considering the provisions of state law that define the agency's character.")).

Although there is no dispute between the parties as to the issues, we conclude that we are required to undertake such an inquiry of our own into: (1) whether the District Attorney is the final official source for policies, training, and procedures to assure that all evidence favorable to an accused obtained by the Sheriff's Office is conveyed to the District Attorney and disclosed to the defense when the evidence is material either to guilt or to punishment; and (2) what entity is liable under § 1983 in an "official capacity" suit for a district attorney's policies that cause constitutional

torts related to the failure to disclose material evidence favorable to criminal defendants.

As we noted earlier, for purposes of Eleventh Amendment immunity, a district attorney, sued in his official capacity, is a local, not a state, government official and, therefore, is not entitled to such immunity. Mairena, 816 F.2d at 1064, n.1; Hudson, 1999 WL 249147, at *14. Under the Louisiana Constitution and laws, a district attorney, like a sheriff, is virtually an autonomous local government official. LA. CONST. art. 5, §§ 26, 27; art. 6, §§ 5(G), 7(B), 25; La. Rev. Stat. 16:1, et seq. Subject to a narrow, rarely invoked exception, the Louisiana [*40] Constitution provides that a district attorney has charge of every criminal prosecution by the State in his district, and is the representative of the State before, and legal advisor to, the grand jury. LA. CONST. art. 5, § 26(B); see State v. Perez, 464 So. 2d 737, 746 (La. 1985) (Dixon, C.J., concurring in the denial of rehearing); In re Guste, 454 So. 2d 806 (La. 1984); Charles J. Yeager & Lee Hargrave, The Power of the Attorney General to Supercede a District Attorney: Substance, Procedure & Ethics, 51 LA. L. REV. 733 (1991).

Further, a district attorney is constitutionally authorized to select assistants as authorized by law, and other personnel. LA. CONST. art 5, § 26(A); and is constitutionally shielded from the effect of powers granted other local government entities. LA. CONST. art. 6, §§ 6(G), 7(B), and 25. In addition to the specific grants of constitutional powers and duties, there are statutory provisions for powers and duties; authority to employ assistants, investigators, and other personnel; funding from state, local, and independent sources; and

the establishment of a retirement system for district attorneys and their assistants. La. Rev. Stat. §§ 16:1-912; §§ 11:1581-1587. These constitutional and statutory provisions indicate that a district attorney is the independent and final official policymaker for all of the administrative and prosecutorial functions of his office. Although we have found no Louisiana cases squarely deciding the issue, we infer from state cases dealing with sheriffs that the entity liable for the torts of a district attorney's employees under state law is the office of the district attorney as an independent local government entity. n8 In a suit under Louisiana tort law against a sheriff, seeking to hold him vicariously liable for the tort of his employee or deputy, and not because of the sheriff's own negligence, the sheriff in his official capacity is the appropriate governmental entity on which to place responsibility for the torts of a deputy sheriff. See Jenkins v. Jefferson Parish Sheriff's Office, 402 So. 2d 669, 671 (La. 1981); accord Riley v. Evangeline Parish Sheriff's Office, 637 So. 2d 395 (La. 1994). Therefore, a sheriff cannot be held personally liable in vicarious responsibility for the torts of his employee or deputy, and any judgment against a sheriff in his official capacity must be recovered from his liability insurer or the public funds controlled by him or his successor in office. Id. Because the district attorney's position is closely analogous to that of the sheriff as a virtually autonomous local government official, we conclude that the Louisiana courts would be guided by the same principles and deem suits seeking to hold a district attorney vicariously liable for the torts of assistants or employees, and not for the district attorney's own negligence, to be in-capacity suits in which the district attorney could not be held personally liable.

Considering the Louisiana constitutional and statutory law and tort cases, we conclude that, in a suit against a district attorney in his official capacity under § 1983 for constitutional torts caused by the district attorney's policies regarding the acquisition, security, and disclosure of Brady material, a victory for the plaintiff imposes liability on the district attorney's office as an independent local entity. Accordingly, a district attorney cannot be held personally liable in an "official capacity" suit, and any judgment against a district attorney in his official capacity must be recovered from his liability insurer or the public funds controlled by him or his successor in office.

For purposes of "official capacity" suits under § 1983, the district attorney's office resembles other local government entities. Therefore, we advert to the Supreme Court's development of principles for determining whether a municipality or other local government entity should be held liable under 42 U.S.C. § 1983 for the constitutional tort of its employee. Title 42 U.S.C. § 1983 provides in pertinent part:Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In Monell, the Supreme Court held that municipalities and other local government bodies are "persons" within the meaning of § 1983. Monell, 436 U.S. at 689. The

Court said that municipalities cannot be held liable for constitutional torts under § 1983 "on a respondeat superior theory," id. at 691, but they can be held liable "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." Id. at 694. "Tortious conduct, to be the basis for municipal liability under § 1983, must be pursuant to a municipality's 'official policy'. . . . [This] requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." Pembaur, 475 U.S. at 479. In other words, "the act of the municipality is the act only of an authorized policymaker or of an employee following the policymaker's lead." Bryan County Comm'rs v. Brown, 520 U.S. 397, 137 L. Ed. 2d 626, 117 S. Ct. 1382 (1997) (Souter, J. dissenting).

The "official policy" requirement may be met in at least three different ways: Id. at 406-08. (1) "When the appropriate officer or entity promulgates a generally applicable statement of policy and the subsequent act complained of is simply an implementation of that policy." Id. at 417 (Souter, J., dissenting). See, e.g., Monell, 436 U.S. at 660-61 (city agencies issued a rule requiring pregnant employees to take unpaid leaves before any medical need arose); (2) Where no "official policy" was announced or promulgated but the action of the policymaker itself violated a constitutional right. Bryan County, 520 U.S. at 417-18 (Souter, J., dissenting). See Owen v. City of Independence, 445 U.S. 622, 63 L. Ed. 2d 673, 100 S. Ct. 1398 (1980) (city council allegedly censured and discharged an employee

without a hearing); Newport v. Fact Concerts, Inc., 453 U.S. 247, 69 L. Ed. 2d 616, 101 S. Ct. 2748 (1981) (city council canceled a license permitting a concert following dispute over the content of performance); Pembaur, 475 U.S. at 485 (county prosecutor, acting as county's final decision maker, directed county deputies to forcibly enter plaintiff's place of business to serve capiases upon third persons); and (3) Even when the policymaker fails to act affirmatively at all, if the need to take some action to control the agents of the local governmental entity "is so obvious, and the inadequacy [of existing practice] so likely to result in the violation of constitutional rights, that the policymaker. . . can reasonably be said to have been deliberately indifferent to the need." Canton, 489 U.S. 378, 390, 109 S. Ct. 1197, 103 L. Ed. 2d 412 ("Only where a municipality's failure to train its employees . . . evidences a 'deliberate indifference' to the rights of its inhabitants can . . . a shortcoming be . . . city 'policy or custom'. . . actionable under § 1983.").

The present case falls in the third category because Burge argues that the District Attorney failed through deliberate indifference to establish policies and procedures needed to protect accuseds from Brady violations, not that the District Attorney promulgated a generally applicable policy whose implementation caused a constitutional tort or that, without announcing a policy, the District Attorney violated a person's constitutional right by his own act. Moreover, based on the record presented for our review, there can be little doubt that the District Attorney's policies and procedures on their face did not violate the Constitution. The District Attorney entrusted the prosecution of murder and other major felony cases

only to well qualified and experienced assistant district attorneys. The record does not indicate that the District Attorney established a special training or testing program for the assistants with regard to identifying and disclosing exculpatory evidence. Instead, he relied on the professional education, training, experience, and ethics of the assistants in the performance of their constitutional responsibilities. There was no evidence of a single instance, much less a pattern, of Brady violations by the District Attorney's Office prior to the Burge case. The District Attorney testified that his specific instruction or policy "across the office" was that any material classified as Brady material was to be surrendered to the defense; that any assistant district attorney who withheld Brady material contrary to this policy would be subject to disciplinary action or termination; and that there had been no violation by any assistant of which he was aware. The First Assistant District Attorney testified essentially to the same policy and to the absence of any violations. The record contains no evidence controverting their testimony with regard to the office policy and good record prior to the Burge case.

The District Attorney stated that the office procedure for inspecting an investigatory file for Brady material was that, first, the Chief of the Criminal Division screened each felony file and made an initial determination; second, the assistant district attorney to whom the case was assigned reviewed the file and conferred with the Chief of the Criminal Division as to the final determination and response to discovery motions; finally, if the case was reassigned, the newly assigned assistant would be thoroughly briefed about the case and the file by the first attorney on the case.

Specifically, the claim in this case is that the District Attorney should be held liable in his official capacity because of his "complete failure to promulgate and implement policies, training and procedures to insure that all pertinent materials, including exculpatory evidence, that are gathered by a Sheriff's Office are transmitted from the Sheriff to the District Attorney [and] then disseminated to the appropriate [assistant district attorneys.]" Appellant's Orig. Br. at 19.

The Supreme Court has recognized that "there are limited circumstances in which an allegation of a 'failure to train' can be the basis for liability under § 1983." Canton, 489 U.S. at 387 (citing numerous courts of appeals cases, e.g., Languirand v. Hayden, 717 F.2d 220, 227-28 (5th Cir. 1983), cert. denied, 467 U.S. 1215 (1984)). For example, "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. . . . Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." 489 U.S. at 388. If, in the light of the duties assigned to specific officers or employees the need for more or different training is so likely to result in the violation of constitutional rights, the policymakers of a city can reasonably be said to have been deliberately indifferent to the need, for which the city may be held liable if the failure to provide proper training, which may be viewed as a city policy, actually causes injury. Id. at 390. The Canton Court emphasized that, for liability to attach in this circumstance, the identified deficiency in a city's

training program must be closely related to the ultimate injury. Id. at 391. In other words, the focus must be on the adequacy of the training program in relation to the tasks the particular officers must perform, and it must be proven that the identified deficiency in training actually caused the failure of the employee or officer to perform his duty constitutionally, i.e., that the injury would have been avoided had the employee been trained under a program that was not deficient in the identified respect. Id. We see no reason that these principles should not also govern our decision in determining whether the district attorney is liable under § 1983 for failure to establish policies and procedures obviously needed to prevent Brady violations.

Applying the foregoing principles, we conclude that there is no warrant in the record for a reasonable trier of fact to find that the District Attorney deliberately disregarded the need for additional policies, training, and procedures to insure the acquisition of Brady material from the Sheriff's Office, its secure distribution to the appropriate assistants, and its disclosure to criminal defendants when the evidence was material to guilt or punishment. The summary judgment evidence does not focus directly on the adequacy of the training or supervision of the District Attorney's assistants and employees in relation to the tasks that particular persons must perform. Instead, Burge attempts to identify deficiencies in the District Attorney's Office procedures and record keeping that reflect inadequate supervision or training.

When the District Attorney took office in January 1985, his staff inventoried all of the files on hand and began a

system of logging each old and new file on Rolodex files. The office obtained a computer system in 1987 and now keeps track of the files electronically. The District Attorney established a written policy of requiring that all files be kept in a record room and checked out only through a custodian, but this proved to be unworkable due to the assistants' continual need to readily access the files. Hence, assistant district attorneys are allowed to check out files assigned to them to be kept in their offices. The files may not be taken out of the District Attorney's Office or turned over to any person other than an attorney assigned to the case. The District Attorney's Office usually receives a copy of the detectives' complete investigatory file from the Sheriff's Office. The Sheriff's Office retains the original file and in due course microfilms the entire file and places the original in storage. If the Sheriff's detectives generate additional material for a file of which a copy already has been sent to the District Attorney's Office, a copy of any additional matter is forwarded to the District Attorney. If the Sheriff's and the District Attorney's systems work as designed, until final disposition of a case, there will always be a complete, up-to-date original investigatory file, and in due course a complete microfilm copy, in the Sheriff's Office, as well as a complete updated copy of the original or microfilm copy of the investigatory file in the District Attorney's Office.

The District Attorney and his first assistant testified that very infrequently a page or part of an investigatory file copy has been misplaced by their office, requiring them to obtain backup copies of pages or parts from the Sheriff's Office. They could not recall any specific instance, except in the Burge case, in which

an entire investigatory file copy had been lost by their office; they were certain that no other murder or major felony file copy had been misplaced. The District Attorney's Office does not have a microfilm system and relies on the Sheriff's Office as its back-up system. The record contains no evidence that controverts their testimony.

Burge argues that the District Attorney's policies, training, and procedures were constitutionally deficient because he did not institute any policy or procedure to ensure that the Sheriff's Office would turn over all Brady material in each case. The record is devoid of evidence, however, that prior to the Burge case the Sheriff's Office ever failed to deliver complete copies of the investigatory files to the District Attorney or to update them properly. The District Attorney's Office procedures required that in each case, in addition to the review of the investigatory file for Brady material by the felony-screening attorney and the attorney assigned to the case, each assistant district attorney was required to conduct pre-trial interviews with the State's witnesses, which usually included investigating officers, thus providing another check against failure to detect and disclose Brady material. Burge does not describe in any detail the specific Brady-related policy or procedure the District Attorney should have imposed on the Sheriff's Office or point to any clear legal authority for a district attorney's oversight or regulation of a sheriff's operations. n9 Burge's argument that the incumbent district attorney should have established policies and procedures to bring about greater cooperation in the communication of information by former assistant district attorneys employed by his predecessor in office suffers from

similar lack of specificity and citation of legal authority. Burge's assertion that the District Attorney failed to institute a procedure to insure that information of an exculpatory nature was passed on from one assistant to another is simply incorrect, as reflected by our foregoing description of the undisputed evidence regarding the procedures of the District Attorney's Office. Consequently, we conclude that based on the evidence of record, no reasonable trier of the facts could find a deficiency in the District Attorney's administration of his office, with respect to the training and supervision of his own personnel or the elicitation of full disclosure of Brady material from the Sheriff's Office, that reflects deliberate indifference to the constitutional rights of defendants in criminal cases.

Even if we were to assume deliberate indifference by the District Attorney in administration, supervision, and training with respect to Brady material, the summary judgment evidence does not support a reasonable finding that such a deficiency actually caused the Brady violation of Burge's constitutional rights prior to and during his first trial. The record reflects that there was a failure to disclose several items of evidence favorable to the defense within the knowledge of officers acting on the State's behalf in the case: (1) Mrs. Frierson's October 17, 1980 statement that she could not identify the person with whom Douglas Frierson departed from her house shortly before his murder; (2) Prestwood's statement of April 21, 1981 in which she said Pearson told her that Frierson had been "ratting" on Pearson and Burge and that Pearson "shot his head"; (3) Prestwood's statement of November 23, 1983 in which she admitted that she lied when she told Hale that Pearson had been with her

on the night of the murder, and in which she again said that Pearson told her that Frierson was a "rat" and that "we had got his head blown off"; (4) red automobile paint scrapings from the scene of the crime that did not match Burge's vehicle; (5) Detective Hale's case summaries that referred to the above defense-favorable evidence. Because the net effect of the State-suppressed evidence favoring Burge raises a reasonable probability that its disclosure would have produced a different result at the first trial, the failure to disclose that evidence violated Burge's constitutional rights. See Kyles, 514 U.S. at 433-34; United States v. Bagley, 473 U.S. 667, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985); United States v. Agurs, 427 U.S. 97, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976).

Under the record evidence, however, the cause of the violation cannot be attributed reasonably to the District Attorney's failure to adequately supervise or train his personnel or to diligently seek Brady material from the Sheriff's Office. The undisclosed evidence favorable to the defense was of such a quality and quantity that any reasonably qualified and experienced prosecuting attorney would have recognized it as Brady material that he was required to disclose. The assistant district attorneys who reviewed the Burge file possessed credentials even superior to those reasonably required by their positions. Thus, there was no obvious need for more or different training to enable them to recognize the particular undisclosed Brady material in this case and know that they were required to disclose it.

The Sheriff's Office personnel testified that, when the District Attorney's Office discovered that their first copy of the Sheriff's investigatory file was missing, a

second copy of the entire Sheriff's investigatory file was delivered to the District Attorney prior to the first trial. Two assistant district attorneys, Katz and Pastuszek, testified that Mrs. Frierson's October 17, 1980 statement given to Hale definitely was not in the second copy of the investigatory file that they reviewed prior to the first Burge trial. Katz, the assistant who handled the first trial, also testified that he saw two of Prestwood's statements in the file but did not remember which ones they were. He did not recall seeing any of the other Brady material in the file. Thus, there is a genuine dispute as to the contents of the second copy of the Sheriff's investigatory file provided to the District Attorney's Office, but it is not a dispute that can be decided so as to hold the District Attorney liable under § 1983 in his official capacity. If the evident items of Brady material were in the second Sheriff's investigatory file reviewed by the assistant district attorneys, and they negligently or intentionally failed to disclose them, the risk of such an occurrence was not so obvious as to indicate a need for more or different training, or so likely to happen and violate constitutional rights, that the District Attorney can reasonably be said to have been deliberately indifferent to the need for additional policies, training or procedures to safeguard constitutional rights. See Canton, 489 U.S. at 390. If the items of Brady material were not included in the second copy of the investigatory file that the Sheriff's Office provided to the District Attorney, of course, the responsibility for the failure to disclose them cannot be attributed to the District Attorney or his assistants for purposes of § 1983 liability.

(d) Burge's Action Against the District Attorney In His Official Capacity Based on Alleged State Constitutional Violations

Burge argues that the District Attorney should be held liable in his "official capacity" under the State constitution for the same reasons that he ought to be amenable under 42 U.S.C. § 1983. He concedes that the state courts have not addressed the issue, but he contends that we should predict that they will adopt the United States Supreme Court's principles in Monell and its progeny in deciding "official capacity" suits against district attorneys and local governmental entities based on the state constitutional torts of their assistants or employees.

Assuming without deciding that we would agree with Burge's forecast of state jurisprudential developments, we necessarily would come to the same conclusions we did when we applied the federal principles of Monell and its progeny directly to the evidence of record in this case. Accordingly, for the same reasons assigned in that regard, we are still persuaded that the District Attorney's motion for summary judgment should be granted.

2. Claims Against the Sheriff in His Official Capacity Based on Monell and its progeny

The district court denied Sheriff Canulette's motion for summary judgment on Burge's federal Monell claim that Canulette, in his official capacity, was deliberately indifferent to Burge's constitutional rights by failing to institute policies and procedures and train personnel in the transfer of Brady material to the district attorney's

office. The sheriff filed a notice of appeal but has failed to demonstrate that we have jurisdiction of the appeal. We conclude that we do not and accordingly dismiss the appeal for want of jurisdiction. The district court's order denying the sheriff's motion for summary judgment on Burge's "official capacity" suit based on Monell (which held that municipalities are liable under § 1983 only for violations of federal law that occur pursuant to official governmental policy or custom) did not qualify as a "collateral order," there is no pendent appellate jurisdiction under which we may consider the appeal, and this court has not permitted the appeal under 28 U.S.C. § 1292(b).

Federal courts of appeals have "jurisdiction of appeals from all final decisions of the district courts," except where direct review may be had in the Supreme Court. 28 U.S.C. § 1291. "'The collateral order doctrine is best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it.'" Swint v. Chambers County Comm'n, 514 U.S. 35, 41-42, 131 L. Ed. 2d 60, 115 S. Ct. 1203 (1995) (quoting Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 128 L. Ed. 2d 842, 114 S. Ct. 1992 (1994) (quoting Cohen, 337 U.S. at 546)). In Cohen, the Supreme Court held that § 1291 permits appeals not only from a final decision by which a district court disassociates itself from a case, but also from a small category of decisions that, although they do not end the litigation, must nonetheless be considered "final." Swint, 514 U.S. at 42 (citing Cohen, 337 U.S. at 546). "That small category includes only decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable

on appeal from the final judgment in the underlying action." Id. (citing Cohen, 337 U.S. at 546).

The district court's order denying the Sheriff's motion for summary judgment in the "official capacity" suit does not satisfy Cohen's requirement that the decision be effectively unreviewable after final judgment. "When [the Supreme Court] placed within the collateral order doctrine decisions denying pleas of government officials for qualified immunity, [the Court] stressed that an official's qualified immunity is 'an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.'" Swint, 514 U.S. at 42 (quoting Mitchell v. Forsyth, 472 U.S. 511, 526, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985)). Unlike various government officials, when sued in their personal or individual capacities, municipalities do not enjoy immunity from suit -- either absolute or qualified -- under § 1983. See Leatherman, 507 U.S. at 166; Owen 445 U.S. at 650. Personal- or individual-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Graham, 473 U.S. at 165. "Official-capacity suits, in contrast, 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" Id. (quoting Monell, 436 U.S. at 690).

Accordingly, the Sheriff's assertion that his office cannot be held liable under § 1983 as interpreted by Monell and its progeny, because the evidence does not reasonably support a finding that his policy or custom caused a violation of federal law does not rank as an immunity from suit. "Instead, the plea ranks as a 'mere defense to liability.'" Swint, 514 U.S. at 42 (quoting

Mitchell, 472 U.S. at 526). Because an erroneous ruling on liability may be reviewed effectively on appeal from final judgment, the order denying the Sheriff's summary judgment motion in this "official capacity" suit was not an appealable collateral order. See id.

Although the district court certified its not otherwise appealable order with respect to its denial of the Sheriff's motion for summary judgment under § 1292(b), a panel of this court denied permission for an appeal to be taken from that particular ruling. In an interlocutory appeal certified by the district court under 28 U.S.C. § 1292(b), we have no jurisdiction to consider an order not otherwise appealable unless the district court states his opinion in writing that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation and this court of appeal permits an appeal from the order. See Swint, 514 U.S. at 46.

There is no pendent appellate jurisdiction for us to take up the Sheriff's appeal in the "official capacity" suit. We unquestionably have jurisdiction to review the grant of the District Attorney's motion for summary judgment in his "official capacity" suit because the district court designated it as a final judgment under Rule 54(b). Also, we have jurisdiction over Hale's appeal from the denial of his summary judgment motion asserting qualified immunity to the extent it raises a question of law by virtue a previous panel's permission to appeal that order under § 1292(b). But we do not thereby gain authority to review the denial of the Sheriff's motion for summary judgment in his "official capacity" case.

When an order is certified by the trial court, and accepted by the appellate court for immediate review pursuant to § 1292(b), such review is limited to the certified order; issues presented by other, noncertified orders cannot be considered simultaneously. Swint, 514 U.S. at 50 (citing United States v. Stanley, 483 U.S. 669, 676-77, 97 L. Ed. 2d 550, 107 S. Ct. 3054 (1987)). Likewise, when immediate appeal of a particular ruling fits within the Cohen collateral order doctrine, the court of appeal does not necessarily have authority to review other trial court orders in the case. "'Rather, such claims are appealable if, and only if, they too fall within Cohen's collateral-order exception to the final-judgment rule.'" Swint, 514 U.S. at 49 (quoting Abney v. United States, 431 U.S. 651, 663, 52 L. Ed. 2d 651, 97 S. Ct. 2034 (1977)). Although, the Swint Court did not specifically address pendent jurisdiction in connection with orders designated as final under Rule 54(b), it stated in general that:The parties are correct that we have not universally required courts of appeals to confine review to the precise decision independently subject to appeal. . . . We need not definitively or preemptively settle here whether or when it may be proper for a court of appeals with jurisdiction over one ruling to review, conjunctively, related rulings that are not themselves independently appealable. The parties do not contend that the District Court's decision to deny the Chambers County Commission's summary judgment motion was inextricably intertwined with that court's decision to deny the individual defendant's qualified immunity motions, or that review of the former decision was necessary to ensure meaningful review of the matter.Swint, 514 U.S. at 50-51 (internal citations omitted).

The parties in this case have not presented any arguments for the exercise of pendent jurisdiction; nor have they contended that the orders are inextricably intertwined or that conjunctive review is necessary to ensure meaningful review. Hale's qualified immunity, which we discuss in the following section, turns on the resolution of purely factual disputes regarding whether he suppressed evidence and suborned perjury. The Sheriff's official capacity liability turns essentially on the factual question of whether the Sheriff's Office delivered copies of its complete investigatory file to the District Attorney. The District Attorney's lack of official-capacity liability stems from Burge's failure to present evidence supporting a reasonable finding of a deliberate indifference to policies, training, and procedures that caused a constitutional tort. The matters not disposed of involve principally factual disputes that must go to trial, and they present no appellate intertwinement that requires immediate conjunctive review. An erroneous ruling on liability may be reviewed effectively on appeal from final judgment.

Therefore, we dismiss for lack of appellate jurisdiction Canulette's appeal of the district court's denial of summary judgment on Burge's Monell claim against Canulette in his official capacity.

(b) State Law Claims Against Canulette

Because the district court's rulings denying summary judgment to Canulette in his official capacity on Burge's state law claims likewise are not included in this court's § 1292(b) certification, and for the reasons

stated in the previous section, we lack appellate jurisdiction to review them.

B. Issues Related to Burge's Claims Against Deputy Hale in His Individual Capacity

1. Absolute Immunity

We agree with the district court that Hale is not entitled to absolute immunity on the grounds that his alleged constitutional violations "place him in a role traditionally occupied by prosecutors." The traditional functions of a prosecutor are to decide which suits to bring and to conduct them in court. Hart v. O'Brien, 127 F.3d 424, 440 (5th Cir. 1997), cert. denied, 525 U.S. 1103, 142 L. Ed. 2d 770, 119 S. Ct. 868 (1999). Because Hale's function was to obtain evidence prior to indictment, his role was as an investigator, and not a prosecutor, so that he is not entitled to absolute immunity. See id; Buckley v. Fitzsimmons, 509 U.S. 259, 276, 125 L. Ed. 2d 209, 113 S. Ct. 2606 (1993) (only when the functions of prosecutors and detectives are the same, is the immunity that protects them also the same).

2. Jurisdiction Over Orders Denying Qualified Immunity

Although this issue was not raised by the parties, as a threshold matter, this court must examine the basis of its jurisdiction. Hart, 127 F.3d at 435. A court of appeals has jurisdiction of appeals from all final district court decisions. 28 U.S.C. § 1291; Johnson v. Jones, 515 U.S. 304, 309, 132 L. Ed. 2d 238, 115 S. Ct. 2151 (1995). Generally, an order denying a motion for summary judgment is not an appealable final decision under §

1291. Francis v. Forest Oil Corp., 798 F.2d 147, 149 (5th Cir. 1986). However, to the extent that an order of a district court rejecting a governmental official's qualified immunity defense turns on a question of law, it is a final decision within the meaning of § 1291 under the Cohen collateral order doctrine, and therefore is subject-to immediate appeal. Mitchell, 472 U.S. at 530.

Claims of qualified immunity are analyzed under a two-part framework. Harper v. Harris County, Tex., 21 F.3d 597, 600 (5th Cir. 1994). The court first determines whether the plaintiff has asserted a violation of constitutional right at all. Id. This court uses "currently applicable constitutional standards to make this assessment." Rankin v. Klevenhagen, 5 F.3d 103, 106 (5th Cir. 1993). Then the court assesses whether that right was clearly established such that a reasonable person in the defendant's position would have known that his conduct violated that right. See Siegert v. Gilley, 500 U.S. 226, 231-32, 114 L. Ed. 2d 277, 111 S. Ct. 1789 (1991).

Orders denying qualified immunity are based on an issue of law when: (1) they decide whether the legal right allegedly violated by the official was clearly established at the time of the challenged action; or (2) in cases in which the district court has denied summary judgment for the official on the ground that even under the defendant's version of the facts, the defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the defendant claims he took. Mitchell, 472 U.S. at 528.

On the other hand, to the extent that the appealing official seeks to argue the insufficiency of the evidence

to raise a genuine issue of fact for trial, i.e., that the evidence presented was insufficient to support a conclusion that the official engaged in the particular conduct alleged, we do not possess jurisdiction under § 1291 to consider the claim and, therefore, may not do so absent some independent jurisdictional base (such as certification under 28 U.S.C. § 1292(b)). See Johnson, 515 U.S. at 313.

In sum, we possess no jurisdiction over a claim that a plaintiff has not presented enough evidence to prove that the plaintiff's version of the events actually occurred, but we have jurisdiction over a claim that there was no violation of clearly established law accepting the facts as the district court viewed them. In its order denying immunity, the district court was detailed and precise in articulating the genuine issues of fact that precluded summary judgment. For the following reasons, we conclude that this court lacks appellate jurisdiction to review the district court's denial of Hale's summary judgment motion seeking qualified immunity from Burge's § 1983 claims.

3. Alleged Brady Violations

Addressing Burge's claims of Brady violations by Hale in failing to disclose exculpatory evidence, the district court declared that "the plaintiff has adduced sufficient evidence to overcome the good faith n10 qualified immunity defense of former deputy Gary Hale."

According to the court, this evidence included Hale's alleged statements to Lt. Hermann after Burge's conviction that he had hidden original statements in the trunk of his car, and that disclosure of these statements

would probably affect the outcome of the case. The district court concluded that Lt. Hermann's testimony alone was "sufficient to pierce the good faith qualified immunity defense of Hale and to create a fact issue for trial, rendering summary judgment inappropriate." (Emphasis added).

On appeal, Hale argues that: (1) Mrs. Frierson's first statement was not exculpatory because it is "facially neutral," and did not become exculpatory until she allegedly gave inconsistent testimony at Burge's first murder trial in 1986, after Hale left the Sheriff's Office; and (2) Burge cannot put forth sufficient evidence to show that exculpatory material was withheld intentionally by Hale.

We disagree that Mrs. Frierson's October 17, 1980 statement did not become Brady evidence until it became impeachment evidence after her testimony at trial. Brady held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87. In United States v. Bagley, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985), the Court "held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Kyles v. Whitley, 514 U.S. 419, 433, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995) (quoting Bagley, 473 U.S. at 682). "Bagley materiality is defined 'in terms of suppressed evidence considered collectively, not item-

by-item.'" Id. at 436. Accordingly, the definition of Bagley materiality in terms of the cumulative effect of suppression leaves the government with a degree of discretion, and it imposes a corresponding burden. Id. at 437. In our opinion, Mrs. Frierson's October 17, 1980 statement in which she said she could not identify either the person who picked her son up just before his murder or the vehicle the person was driving was "favorable evidence" for the defense although alone it might not have been "material." But, when considered collectively with all of the other suppressed evidence, it was clearly favorable and material. From our review of the evidence of record, we believe it may reasonably be contended that Hale was aware of this long before Mrs. Frierson's testimony at the first trial because there is evidence that he was a party to the other suppressions of evidence and to the suborning of the perjury by Mrs. Frierson that conflicted with the first statement she gave to Hale. Moreover, even if the evidence of Hale's suppression of Mrs. Frierson's statement were to be disregarded, Hale's motion for summary judgment must be evaluated in light of the evidence of his other relevant suppressions of evidence.

In support of his motion for summary judgment Hale does not raise any issues of law but argues that Burge's countervailing evidence is not sufficient to prove that Hale intentionally withheld evidence. In short, the issue presented by Hale's motion for summary judgment and the evidence of record is the existence or non-existence of a triable issue of fact about Hale's intent, which is the kind of factual controversy that is not immediately reviewable. See Johnson, 515 U.S. at 316. n11 Therefore, this court lacks jurisdiction over Hale's

appeal of the court's denial of qualified immunity on Burge's § 1983 Brady claim.

4. § 1983 Claim of Arrest Without Probable Cause

The district court also denied Hale's motion for summary judgment on Burge's § 1983 claim for Burge's alleged false arrest on October 24, 1980, declaring: To establish a constitutional claim for false arrest, the plaintiff must prove that the police officer lacked probable cause to arrest him. . . . The presence or absence of probable cause is a material question of fact in dispute, as Detective Hale knew at the time of the first trial that the one witness who could identify Burge as having been with the victim shortly before his murder could not testify as to that fact the day following the murder. While it is certainly possible, indeed perhaps likely, that the factfinder would conclude that there was sufficient evidence to meet the probable cause standard as to the arrest of Burge, such a determination as a matter of law based upon disputed facts is not appropriate in a summary judgment ruling.

On appeal, in addressing Burge's federal claim based on his alleged false arrest on October 24, 1980, Hale argues that there was sufficient evidence to meet the probable cause standard needed for the arrest of Burge, i. e., that Hale had knowledge or reasonably trustworthy information sufficient to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested. See Dunaway v. New York, 442 U.S. 200, 208 n.9, 60 L. Ed. 2d 824, 99 S. Ct. 2248 (1979); Greer v. Turner, 639 F.2d 229, 232 (5th Cir. Unit B Mar. 1981).

Burge and Hale dispute underlying historical facts material to probable cause: (1) whether Burge had contact with Frierson after midnight on the day of the murder; (2) whether Burge gave inconsistent statements to the police; and (3) whether Burge had a motive for killing Frierson.

The summary judgment record contains evidence tending to controvert Hale's version and support Burge's: (1) Hale's initial resume indicates that Sgt. B. Smith gave Hale a statement before Hale's arrest of Burge on October 24, 1980 placing Frierson in Picayune with three identified men other than Burge at 12:45 a.m. on the night of the murder; (2) Mrs. Frierson's initial statement to Hale the day of the murder stated that she could not identify the person or the vehicle of the person who picked up Frierson at her house prior to the murder; (3) Hale's admissions to Lt. Hermann indicating that he had suborned the perjury of Mrs. Frierson to the effect that she saw Burge pick up her son on the night of his murder, and the perjury of both Mrs. Frierson and Glenda Frierson Hale that Burge described details of the murder scene and trauma to the victim's body on the morning of the murder; (4) Hale's initial resume did not refer to any such statement by Mrs. Frierson or Glenda Frierson Hale; (5) Mrs. Frierson admitted at the second trial that her testimony at the first trial had been perjurious; and (6) Hale's "loss" of the original tape of one of Burge's statements suggests that Hale's claim that Burge's pre-arrest statements were inconsistent is erroneous or intentionally false and that Hale cannot convincingly demonstrate the alleged inconsistencies.

On the other hand, the summary judgment record contains no evidence showing what information, if any, Hale presented to the magistrate who issued the warrant for Burge's arrest on October 24, 1980, other than Hale's boiler-plate affidavit stating, in pertinent part, that on October 17, 1980, "Gerald Burge did willfully, and maliciously Murder Douglas Frierson On US Hwy 190 outside of Slidell, La." In his deposition, Hale did not testify as to what information, if any, he presented to the magistrate with his application for the arrest warrant.

Hale argues that, nevertheless, he is entitled to a judgment of qualified immunity as a matter of law because his conduct in applying for the warrant, and arresting Burge, was in fact objectively reasonable, citing Malley v. Briggs, 475 U.S. 335, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986). However, based on the present disputed state of factual development, it is not now possible to conclude as a matter of law -- considering the conflicting evidence in a light most favorable to Burge -- that Hale acted in an objectively reasonable manner in arresting Burge on October 24, 1980. See Lampkin v. City of Nacogdoches, 7 F.3d 430, 435 (5th Cir. 1993). In such case, this court lacks appellate jurisdiction over an appeal from denial of summary judgment. See id. at 435-36; Mangieri v. Clifton, 29 F.3d 1012, 1016 (5th Cir. 1994).

5. State Law Constitutional and Ordinary Tort Claims
Defendant Hale also appeals the district court's denial of his motion for summary judgment on Burge's state law claims of malicious prosecution, false arrest and imprisonment, and violation of civil rights under the Louisiana Constitution.

(a) State Constitutional Claim

In examining Burge's claim that Hale violated his civil rights arising under the Louisiana Constitution, the district court found that "because there are allegations that . . . Hale was not acting in good faith, but intentionally, in depriving plaintiff of his constitutional rights, qualified immunity for state constitutional violations must be denied."

Whether an order is an appealable "final decision" for purposes of 28 U.S.C. § 1291 is a question of federal, not state, law. Cantu v. Rocha, 77 F.3d 795, 803 (5th Cir. 1996). An order denying qualified immunity under state law is immediately appealable as a "final decision," provided that "the state's doctrine of qualified immunity, like the federal doctrine, provides a true immunity from suit and not a simple defense to liability." Id. at 803-04. The Louisiana Supreme Court has answered this question affirmatively, declaring that "the same factors that compelled the United States Supreme Court to recognize a qualified good faith immunity for state officers under § 1983 require us to recognize a similar immunity for them under any action arising from the state constitution." Moresi v. Department of Wildlife and Fisheries, 567 So. 2d 1081, 1093 (La. 1990).

Therefore, we are persuaded that Louisiana law insulates government officials entitled to qualified immunity from liability and the burden of suit, as well as from judgment for damages, so that orders premised on the denial of qualified immunity in actions based on Louisiana constitutional violations are appealable in a federal court action to the same extent as district court

orders premised on the denial of federal qualified immunity. See Cantu, 77 F.3d at 804.

We then address whether the district court's denial of Hale's motion for summary judgment on Burge's state constitutional claims on the grounds of qualified immunity "turned on an issue of law." Id. We conclude that it does not.

On appeal, Hale adopts by reference the same purely factual argument asserted against Burge's federal constitutional claims, i.e., that there is insufficient evidence that Hale intentionally withheld exculpatory material and suborned perjury. For the same reasons given above, we lack jurisdiction over the district court's denial of qualified immunity on Burge's state constitutional claim.

(b) State Ordinary Tort Law Claims

Whether we can exercise pendent appellate jurisdiction over Burge's ordinary state law tort claims against Hale depends on whether we have jurisdiction over Hale's appeal of the denial of qualified immunity. See Swint, 514 U.S. at 51 (pendent appellate jurisdiction is limited to questions that are "inextricably interwoven" with an issue that is properly before the appellate court"); see also Shinault v. Cleveland County Bd. of County Comm'rs, 82 F.3d 367, 370 (10th Cir. 1996), cert. denied, 519 U.S. 1078, 136 L. Ed. 2d 678, 117 S. Ct. 740 (1997). Because we conclude that we lack jurisdiction over Hale's interlocutory appeal of the denial of qualified immunity, we cannot exercise pendent appellate jurisdiction to review Hale's state law claims of malicious prosecution, false arrest and false

imprisonment. See Shinault, 82 F.3d at 371; Sevier v. City of Lawrence, Kan., 60 F.3d 695, 701 (10th Cir. 1995) [*84] ("given our holding that we lack jurisdiction over Defendants' appeal of the district court's ruling on qualified immunity, no permissible appeal exists upon which to exercise pendent jurisdiction").

Therefore, we dismiss for lack of jurisdiction Hale's appeal of the district court's denial of summary judgment on Burge's § 1983 claims and state law claims.

V. CONCLUSION

For the reasons assigned, SUMMARY JUDGMENT in favor of District Attorney Walter H. Reed and against Gerald Burge dismissing Burge's suit against the District Attorney, in his official capacity, with prejudice, is AFFIRMED; the APPEALS of Sheriff Patrick J. Canulette, in his official capacity, and Gary Hale are DISMISSED for lack of jurisdiction; and the case is REMANDED to the district court for further proceedings.

SUMMARY JUDGMENT AFFIRMED; other APPEALS DISMISSED; REMANDED.

All pending motions are hereby MOOT, in light of the opinion.

FOOTNOTES

* Judge Jones concurs in the opinion, except for the discussion in part IV (A) (1)(b), (c) and (d), in which she concurs as to the judgment only.

n1 In Brady v. Maryland, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), the U.S. Supreme Court held that the "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."

n2 Burge claimed that the defendants failed to produce: (1) statements by Bernice Frierson, Spears, and Pearson; (2) crime lab reports of the tire tracks and red paint scrapings taken at the murder scene that did not match Burge's vehicle; and (3) the detectives' resumes containing information that Pearson had admitted to Prestwood and Spears that he had murdered Frierson and that Mrs. Frierson did not see with whom her son left on the night of his murder.

n3 In January 1996, after the defendants' motions for summary judgment were filed, Burge filed a separate diversity suit in federal court against Canulette in his official capacity as Sheriff of St. Tammany Parish, and against McCormick individually, asserting a state law spoliation of evidence claim based on the defendants' alleged negligent or intentional loss or destruction of the original investigatory file. In February 1996, this suit was consolidated with Burge's original federal suit.

n4 The district court granted summary judgment for defendants Thomas, Moore and Drennan, in their individual capacities, upholding their claims of qualified immunity. Burge does not appeal this ruling.

n5 Monell claims are limited to those against local governmental units that are not considered part of the

State for Eleventh Amendment purposes. See Monell, 436 U.S. 658, 691 n.54, 98 S. Ct. 2018, 56 L. Ed. 2d 611. n6 "[A] claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment. . . . This principle applies as well to state law claims brought into federal court under pendent jurisdiction." Pennhurst State Sch. and Hosp. v. Halderman, 465 U.S. 89, 121, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984).

n7 Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949).

n8 In Diaz v. Allstate Ins. Co., 433 So. 2d 699 (La. 1983), the Louisiana Supreme Court produced a fractured decision without a majority rationale. In vacating a district court's declaration of unconstitutionality of a state statute, but affirming the district court's decision overruling the State's motion for summary judgment: two justices were of the opinion that an assistant district attorney was an employee of the State, not of local government, for purposes of seeking indemnification by the State from financial loss arising out of any claim by reason of his employment-related torts under La. Rev. Stat. § 13:5108.2(B) and therefore was entitled to bring the state in as a third party; one justice concurred without reasons; one justice concurred in the result apparently because he agreed with the district court's reasoning that La. Rev. Stat. § 42:1441(A), which purported to shield the State from liability for damage caused by an employee of a district attorney, was unconstitutional; one justice dissented being of the opinion that an assistant district attorney is not a state employee; one justice dissented

principally because he did not think the State could be third-partied under a statute that merely facilitates indemnification following a judgment or specially approved settlement: and one justice dissented without contemporaneously filing reasons. In view of our circuit precedent in Mairena v. Foti, 816 F.2d 1061 (5th Cir. 1987), holding that a Louisiana district attorney is a local government official not entitled to Eleventh Amendment immunity, none of the opinions in Diaz is helpful in identifying the entity liable under § 1983 in an "official capacity" suit for the constitutional torts caused by a district attorney's policies.

n9 It is true, as Burge points out in his opposition to summary judgment, that the Supreme Court in Kyles v. Whitley, 514 U.S. 419, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995), in rejecting the argument that the state prosecutor in a criminal case "should not be held accountable under Bagley and Brady for evidence known only to police investigators and not to the prosecutor[,]" stated:No one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that "procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it." Giglio v. United States, 405 U.S. 150, 154, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972). Since, then, the prosecutor has the means to discharge the government's Brady responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the

final arbiters of the government's obligation to ensure fair trials.514 U.S. at 438.

Thus, the Court held that a state prosecutor is responsible, for purposes of the criminal case, for the failure, by any other person acting on the government's behalf in the case, including the police, to disclose known, defendant-favorable evidence rising to a material level of importance. But the Court did not indicate that a state district attorney is vicariously liable under § 1983 for police derelictions or that he or she may use any means other than those available under state law to actually obtain such evidence from the police. The suggestion that "'procedures and regulations can be established'" for this purpose by a prosecutor comes from Giglio, which spoke only of a federal prosecutor's authority within his own office to insure communication of promises made to a government witness by one government attorney to every other government lawyer who deals with the case. Under state law, the district attorney has similar authority within his own office, and he has the means to subpoena and depose individual officers and employees of other government officials, but it is doubtful that he enjoys the broad power to promulgate Brady-related regulations and procedures governing the internal operations of a sheriff's office.

n10 The "good faith" immunity of public officers from constitutional tort liability is now a misnomer; ever since Harlow v. Fitzgerald, 457 U.S. 800, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982), it is forfeited not by showing that the officer was acting in bad faith but by showing that he was violating a clearly established

constitutional principle. See Jones v. City of Chicago, 856 F.2d 985, 994 (7th Cir. 1988).

n11 We summarily reject Hale's alternative legal argument that the law was not "clearly established" because this court did not extend the Brady obligation to police officers until 1988, two years after Burge's first trial, in Geter v. Fortenberry, 849 F.2d 1550 (5th Cir. 1988). Twenty-one years before Geter, this court declared that suborning perjury and concealing exculpatory evidence by police officers were constitutional violations. See Luna v. Beto, 391 F.2d 329, 332 (5th Cir. 1967).

No. 92-3659.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Gerald BURGE,
Plaintiff-Appellant,

v.

PARISH OF ST. TAMMANY, et al.,
Defendants-Appellees.

August 2, 1993, Decided

COUNSEL: For Plaintiff-Appellant: Mark William Smith, 2540 Severn Ave., Ste. 400, Metairie, LA 70002, 885-9994.

For Defendants-Appellees: Margaret H. Kern, JONES, FUSSELL, BURAS, ET AL., 1000 Hwy. 190, Ste. 103, Covington, LA 70433, (892-4801).

JUDGES: Before SMITH, DUHE, and WIENER, Circuit Judges.

OPINIONBY: DUHE

OPINION: DUHE, Circuit Judge:

Gerald Burge appeals the dismissal of his civil rights action. The district court concluded that Burge's claims were barred by the applicable one-year statute of limitations. We conclude that Appellant's pursuit of state habeas remedies tolled the prescriptive period.

Accordingly, we reverse and remand for further proceedings.

I.

Appellant was convicted of murder and sentenced to life imprisonment. His counsel then began an inquiry into the disappearance of the police file compiled during the murder investigation. Burge's counsel had previously requested that any exculpatory evidence in the possession of the St. Tammany Parish Sheriff's Office be disclosed so that Burge could prepare his defense. See Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The Sheriff's Office replied that there was no exculpatory evidence; later, it conceded that the police investigatory file was "lost or misplaced."

The investigatory file was ultimately discovered. It contained statements from the decedent's mother and others which cast serious doubt on Burge's guilt. Having previously exhausted his direct appeals, Burge filed a petition in state court for post-conviction relief. This petition alleged that the prosecution's failure to comply with the Brady rule impermissibly violated Burge's right to a fair trial. The state court agreed, and ordered a new trial. In the second trial, Burge was acquitted.

In June 1991, Appellant filed a civil rights action against St. Tammany Parish, the St. Tammany District Attorney's Office, the Sheriff's Office and Sheriff Patrick Canulette, and Detective Gary Hale. 42 U.S.C. § § 1983, 1985 (1981). The claims against the District Attorney's Office were dismissed on the basis of

prosecutorial immunity. The remaining defendants moved to dismiss on the basis of prescription, arguing that Burge's claims accrued, at the latest, on September 1, 1989, when he filed his initial habeas corpus petition alleging a Brady violation. n1 Because there is no federal statute of limitations for § 1983 and 1985 actions, the district court applied Louisiana's liberative prescription (statute of limitations) for tort actions. La.Civ.Code Ann. art 3492 (Supp.1992); see Elzy v. Roberson, 868 F.2d 793, 794 (5th Cir.1989) (approving application of art. 3492 to § 1983 claim). The court held that Burge's claims were prescribed based on this one-year statute of limitation.

II.

On appeal, Burge argues that the prescriptive period was tolled while he exhausted his state remedies. This contention finds support in Fulford v. Klein, 529 F.2d 377 (5th Cir.1976), adhered to en banc, 550 F.2d 342 (5th Cir.1977).

We hold that a § 1983 action for damages based on the withholding at trial of possible exculpatory evidence by state officials in violation of Brady v. Maryland ..., cannot be prosecuted while the state case is on appeal and before all state remedies have been exhausted in seeking relief from the conviction allegedly obtained in violation of the federal Constitution and law.

529 F.2d at 378; see Serio v. Louisiana State Bd. of Pardons, 821 F.2d 1112, 1117 (5th Cir.1987).

Consistent with the practice of borrowing state statutes of limitations for § 1983 claims, federal courts

also look to state law for its tolling provisions. See Hardin v. Straub, 490 U.S. 536, 538-39, 109 S. Ct. 1998, 2000, 104 L. Ed. 2d 582 (1989); Jackson v. Johnson, 950 F.2d 263, 265 (5th Cir.1992). Accordingly, we must assess whether Louisiana law would hold the liberative prescription period in abeyance pending the outcome of Burge's state habeas proceedings. See id. (applying Texas law). n2

III.

"Prescription runs against all persons unless an exception is established by legislation." Minor v. Casten, 521 So. 2d 465, 467 (La.Ct.App.1988). However, Louisiana's jurisprudence recognizes a limited exception to codified prescriptions: Contra non valentem agere nulla currit praescriptio, i.e. prescription does not run against a party who is unable to bring an action. Plaquemines Parish Comm'n Council v. Delta Dev. Co., 502 So. 2d 1034, 1055-56 (La.1987); Minor, 521 So. 2d at 467; see also Ayo v. Johns-Manville Sales Corp., 771 F.2d 902, 907 (5th Cir.1985) (applying Louisiana law). There are four recognized situations where the doctrine of contra non valentem might apply to toll the prescriptive period:

(1) Where there was a legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action; (2) where some condition coupled with the proceedings prevented the creditor from suing or acting; (3) where the debtor has done an act to prevent the creditor from using the cause of action; (4) where the cause of action is not known or reasonably knowable by the plaintiff, even though he is not induced by the defendant.

Minor, 521 So. 2d at 467 (citing Corsey v. State Dep't of Corrections, 375 So. 2d 1319 (La.1979); Gover v. Bridges, 486 So. 2d 1117 (La.Ct.App.), aff'd, 497 So. 2d 1364 (La.1986)). It is the first situation, prevention by a legal impediment, that guides the resolution of the instant dispute.

Burge could not have prosecuted his civil rights claim for damages against the Appellees until he exhausted available state habeas remedies. Serio, 821 F.2d at 1117; Fulford, 529 F.2d at 378, 381, adhered to en banc, 550 F.2d 342 (5th Cir.1977). This was a "legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action." Minor, 521 So. 2d at 467. Because he could not have prosecuted the § 1983 and § 1985 claims until the state habeas proceedings were exhausted, Burge's June 1991 filing of his civil rights claims was not prescribed. n3 See Rodriguez v. Holmes, 963 F.2d 799, 805 (5th Cir.1992) (applying Texas tolling provision, and noting that federal courts have equitable power to fashion tolling provisions in exceptional circumstances); Jackson, 950 F.2d at 266 (Texas law).

While Burge may have been stymied in prosecuting his civil rights claims, he could have tolled the prescriptive period by filing suit in federal court and simultaneously requesting that the action be stayed pending the outcome of his state proceedings. See, e.g., Jewell v. County of Nassau, 917 F.2d 738, 740-41 (2nd Cir.1990) (New York's statutory tolling provisions inapplicable; judicial stay was "only means by which bar of limitations may be avoided.") (citing Board of Regents v. Tomanio, 446 U.S. 478, 486-87, 100 S. Ct. 1790, 1796-97, 64 L. Ed. 2d 440) (1980)). We have recognized that

district courts retain discretion to take such a step to protect plaintiffs against the running of a limitations period. See Borning v. Cain, 754 F.2d 1151, 1152-53 (5th Cir.1985); Richardson v. Fleming, 651 F.2d 366, 375 (5th Cir.1981); Fulford, 529 F.2d at 382, adhered to en banc, 550 F.2d 342 (5th Cir.1977). Nevertheless, in light of Louisiana's jurisprudential tolling mechanism discussed above, we see no purpose in requiring this plaintiff to perform the hollow act of filing a premature complaint pending the exhaustion of his state remedies.

IV.

Louisiana's liberative prescription period was tolled because Burge faced a legal impediment which precluded him from prosecuting his federal civil rights action. His § 1983 and 1985 claims were, therefore, timely filed. We REVERSE the dismissal of his claims and REMAND the matter for further proceedings.

FOOTNOTES

n1 Although state law governs the limitations period and tolling exceptions, see discussion infra at § II, federal law governs when a civil rights action accrues. Jackson v. Johnson, 950 F.2d 263, 265 (5th Cir.1992). Under federal law, such actions accrue "when the plaintiff knows or has reason to know of the injury which is the basis of the action." Id. (internal citations omitted).

n2 See also Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (1975). The Johnson Court held that the timely filing of an employment discrimination charge with the Equal

Employment Opportunity Commission did not toll the limitation period for filing a civil rights (42 U.S.C. § 1981) action. The Court did acknowledge that state law could have provided a tolling mechanism. However, no provisions in Tennessee's statutes were applicable. Id. at 463, 95 S. Ct. at 1721.

n3 On April 12, 1991 the Louisiana Supreme Court denied writs in the state proceeding. The judgment which granted Burge's habeas relief was final at that time. However, Burge was released from custody on July 13, 1990. At this time no further habeas relief, either from the state or federal courts, was possible. Using either of these dates, it is evident that Burge's June 1991 filing of his civil rights actions was timely.

Nos. Civ.A. 91-2321, Civ.A. 96-0244

United States District Court, E.D. Louisiana

Gerald BURGE

v.

ST. TAMMANY PARISH SHERIFF'S OFFICE, et al

July 25, 2001.

RULING ON MOTIONS

LIVAUDAIS, J.

Jury trial commenced in this action on May 7, 2001 and concluded when the jury returned a verdict in favor of the plaintiff on May 10, 2001. Judgment in this action was entered on May 23, 2001 in favor of plaintiff, Gerald Burge, and against defendants, Rodney Jack Strain, in his official capacity as Sheriff of St. Tammany Parish, and Gary Hale, in the sum of $ 4,075,000.00, (Rec.Doc. No. 516), with interest against Gary Hale from the date of judicial demand and interest against Strain, in his official capacity, from the date of entry of judgment.

The following post-trial motions were filed:

1) Motion of plaintiff Gerald Burge for judgment as a matter of law and/or to alter or amend judgment, and/or to clarify judgment pursuant to F.R.Civ.P. 50, 59, and/or 60;

2) Motion of defendant Rodney "Jack" Strain, in his official capacity as Sheriff of St. Tammany Parish, to set aside the verdict and judgment, and for judgment as a matter of law and/or for new trial, pursuant to F.R.Civ.P. 59. Alternatively, defendant moves for remittitur.

Both motions were opposed. Oral argument was heard on the motions.

Relevant Facts

Jury trial was held on the claims of plaintiff, Gerald Burge ("Burge"), against defendant Gary Hale ("Hale"), a former St. Tammany Parish Deputy Sheriff, and against defendant Rodney "Jack" Strain, in his official capacity as Sheriff of St. Tammany Parish (the "Sheriff"). Burge brought claims against Hale under 42 U.S.C. § 1983, for deprivation of his constitutional rights to a fair trial and due process, under 42 U.S.C. § 1983, for conspiracy to deprive him of his constitutional rights, and under state law for intentional infliction of emotional distress and for conspiracy to intentionally inflict emotional distress on him. Plaintiff sought compensatory and punitive damages against Hale. Plaintiff also sued the Sheriff under 42 U.S.C. § 1983, asserting a Monell[1] claim for deprivation of his constitutional rights by an official policy, practice or procedure, and conspiracy claims under both § 1983 and state law. Plaintiff also sought compensatory and punitive damages against the Sheriff in his official capacity.

Because of settlements with various insurers and time periods during which coverage was effective, the jury

was asked to indicate whether the actions of the defendants which gave rise to liability occurred during three separate time periods, September 1, 1980 to August 31, 1983, September 1, 1983 to August 31, 1986, and September 1, 1986 to the present. The jury indicated that the actions of the defendant and the Sheriff, in his official capacity, which gave rise to liability occurred during all three time periods.

The jury declined to award punitive damages against either defendant and found that there was no conspiracy between Hale and persons employed by the St. Tammany Parish Sheriff's Office under either § 1983 or state law. The jury awarded plaintiff substantial compensatory damages, $ 2,000,000 for loss of freedom and imprisonment, $ 2,000,000 for physical and mental pain and suffering, emotional distress and anxiety, $ 250,000 for economic loss during imprisonment, and $ 50,000 for legal expenses which would not have otherwise been incurred, totaling $ 4,300,000. All parties agreed that the defendants were entitled to a credit of $ 225,000. Judgment was entered against defendants Hale and the Sheriff, in his official capacity, in the sum of $ 4,075,000. The judgment indicates that judicial interest runs against Hale from the date of judicial demand, since he was found liable on a state law claim, and against the Sheriff from the date of entry of judgment, since the jury absolved the Sheriff of the only state law claim against him, conspiracy to commit intentional infliction of emotional distress, and based liability on a violation of federal law, 42 U.S.C. § 1983.

Motion of plaintiff, Gerald Burge, for judgment as a matter of law and/or to alter or amend judgment, and/or to clarify judgment

In his post-trial motion, plaintiff Burge complains that he was denied pre-judgment interest on his claims against the Sheriff, in his official capacity, that the judgment is ambiguous and that it should state specifically that both Hale and the Sheriff, in his official capacity, are solidarily liable for the judgment, and that the court erred in dismissing the spoliation of evidence claim he brought against the Sheriff, in his official capacity. The Sheriff opposes the motion.

The Court has previously considered and rejected plaintiff's arguments regarding pre-judgment interest and the spoliation of evidence claim. See, Rec. Doc. No. 515 (entered May 23, 2001) and Rec. Doc. No. 431 (entered June 22, 2000). For these reasons, the court finds that the plaintiff's motion for judgment as a matter of law and/or to alter or amend judgment, as to these two issues, be denied.

Plaintiff also seeks an amendment of the judgment reflecting that both defendant Hale and the Sheriff, in his official capacity, are liable in solido for the judgment. The court agrees that these defendants are solidarily liable for the judgment because plaintiff can only recover once for his compensatory damages, and, viewing the judgment and the evidence in the light most favorable to the jury's verdict, the actions of Hale and the employees of the Sheriff occurred in concert to cause the plaintiff's damages. Thus, this aspect of the motion will be granted, to reflect that the defendants are solidarily liable for the judgment.

Motion of defendant Strain, in his official capacity as Sheriff of St. Tammany Parish, to set aside the verdict, and for judgment as a matter of law, and/or for new trial, and alternatively, for remittitur

The Sheriff moves for judgment as a matter of law on plaintiff's Monell claim against him on the grounds that there was insufficient evidence to base a finding of municipal liability against him in his official capacity, and the court should vacate the judgment on this claim and dismiss it. In the alternative, the Sheriff contends that he is entitled to a new trial on the grounds that the verdict is against the great weight of the evidence, substantial errors were made in the admission or rejection of evidence, and the damages were excessive. Alternatively, defendant argues that the court should grant a remittitur of damages. Plaintiff opposes the motion.

"A motion for judgment as a matter of law ... in an action tried by jury is a challenge to the legal sufficiency of the evidence supporting the jury's verdict." Vadie v. Mississippi State University, 218 F.3d 365, 372 (5 th Cir.2000), reh'g and reh'g en banc denied 232 F.3d 212 (5 th Cir.2000), quoting Hiltgen v. Sumrall, 47 F.3d 695, 699 (5 th Cir.), reh'g and suggestion for reh'g en banc denied, 49 F.3d 730 (5 th Cir.1995); cert. denied, ___ U.S. ___, 121 S.Ct. 859 (2001), ___ U.S. ___, 121 S.Ct. 1092 (2001). On appellate review, the appellate court uses the same standard to review the verdict as does the district court in ruling on the motion for judgment as a matter of law. Id.

As noted by the court in Vadie:

A jury verdict must be upheld unless "there is no legally sufficient evidentiary basis for a reasonable jury to find" as it did. Fed.R.Civ.P. 50(a)(1). "We test jury verdicts for sufficiency of the evidence under the standards set forth in Boeing v. Shipman, 411 F.2d 365, 374 (5 th Cir.1969) (en banc), overruled on other grounds, Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331 (5 th Cir.1997) (en banc), viewing all of the evidence and drawing all reasonable inferences in the light most favorable to the verdict." Scott v. University of Mississippi, 148 F.3d 493, 504 (5 th Cir.1998) (citing Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 998 (5 th Cir.1996) (en banc), quoting Boeing, 411 F.2d at 374. Vadie, 218 F.3d at 372. The Boeing standard requires that there be a "conflict in substantial evidence to create a jury question." 411 F.2d at 375. Substantial evidence is defined as "evidence of such quality and weight that reasonable and fairminded men in the exercise of impartial judgment might reach different conclusions." Boeing, 411 F.2d at 374; see also Krystek v. University of Southern Mississippi, 164 F.3d 251 255 (5 th Cir.1999).

The standards for determining municipal policy and liability were recently reviewed and emphasized in Piotrowski v. City of Houston, 237 F.3d 567, 578 (5 th Cir.), reh'g en banc denied, 251 F.3d 159 (5 th Cir.2001),[2] as follows:

Under the decisions of the Supreme Court and this court, municipal liability under section 1983 requires proof of three elements: a policymaker; an official policy; and a violation of constitutional rights whose

"moving force" is the policy or custom. Monell v. Dep't. of Social Services, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978). Monell and later decisions reject municipal liability predicated on respondeat superior, because the text of section 1983 will not bear such a reading. Bd. of Comm'rs of Bryan County v. Brown, 520 U.S. 397, 403, 117 S.Ct. 1382, 1388, 137 L.Ed.2d 626 (1997). Consequently, the unconstitutional conduct must be directly attributable to the municipality through some sort of official action or imprimatur; isolated unconstitutional actions by municipal employees will almost never trigger liability. Bennett v. City of Slidell, 728 F.2d 762, 768 n. 3 (5th Cir.1984), cert. denied, 472 U.S. 1016, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985); McKee v. City of Rockwall, 877 F.2d 409, 415 (5th Cir.1989), cert. denied, 493 U.S. 1023, 110 S.Ct. 727, 107 L.Ed.2d 746 (1990). The three attribution principles identified here--a policymaker, an official policy and the "moving force" of the policy--are necessary to distinguish individual violations perpetrated by local government employees from those that can be fairly identified as actions of the government itself. Mistakes in analyzing section 1983 municipal liability cases frequently begin with a failure to separate the three attribution principles and to consider each in light of relevant case law.

237 F.3d at 578. The Piotrowski court explained that:

While an unconstitutional official policy renders a municipality culpable under § 1983, even a facially innocuous policy will support liability if it was promulgated with deliberate indifference to the "known or obvious consequences" that constitutional violations would result. Bryan County, 520 U.S. 397, 407, 117 S.Ct.

1382, 1389 (1997). Deliberate indifference of this sort is a stringent test, and "a showing of simple or even heightened negligence will not suffice" to prove municipal culpability..... In addition to culpability, there must be a direct causal link between the municipal policy and the constitutional deprivation. Monell describes the high threshold of proof by stating that the policy must be the "moving force" behind the violation.

237 F.3d at 579-580. Both the causal link and "deliberate indifference" to federally protected rights must be established for municipal liability under § 1983 to lie; such municipal liability is not equivalent to respondeat superior. Piotrowski, 237 F.3d at 580.

While this is a very close question, given the deference the district court must give to the jury's verdict, viewing all the evidence in the light most favorable to it, for the reasons stated by the plaintiff in his memorandum in support, the court finds that there was sufficient evidence to support the jury's verdict against the Sheriff, in his official capacity, on the plaintiff's Monell claim. While the Sheriff disputed the fact that the witness statement of Jean Frierson, which the state courts considered to be Brady material, was not turned over to the district attorney's office prior to Burge's trial, the district attorney who tried the case, Paul Katz, denied that the witness statement was in the materials. The former Sheriff, under whose tenure the plaintiff's trial took place, was unsure of the policies and practices of his office concerning the handling of evidence and investigatory materials, leaving such matters to the discretion of other persons in his office. The Sheriff did not have a practice of logging in each statement and item of evidence separately before

turning it over to the District Attorney to ensure that the District Attorney's office had each item of evidence and each statement, particularly in a murder prosecution. Under these circumstances, the Court finds that the evidence was sufficient to establish a Monell claim.

The Sheriff also seeks a new trial on the grounds that the jury's verdict was against the clear and substantial weight of the evidence, the verdict was clearly excessive, and there were substantial evidentiary errors. For the reasons stated previously, and for the reasons stated by the plaintiff in his memorandum, the Court must deny the motion.

Finally, defendant seeks a remittitur. A jury verdict is considered excessive only if it is "contrary to right reason" or "entirely disproportionate to the injury sustained." Vadie, 218 F.3d at 376, citing Eilan v. Westinghouse Elec. Corp., 58 F.3d 176, 183 (5th Cir. 1995). The award was substantial and deserves some scrutiny. Considering the deferential standard owed to jury verdicts and the injury plaintiff suffered, incarceration in the Louisiana State Penitentiary at Angola, Louisiana under a life sentence, of which he served five years with the real possibility he would never be released, being stabbed and constantly threatened with rape, and losing his business and his home, the Court cannot say that it was "contrary to right reason" or "entirely disproportionate to the injury sustained."

Conclusion

Accordingly, for the above and foregoing reasons,

IT IS ORDERED that the motion of plaintiff, Gerald Burge, for judgment as a matter of law, and/or to alter or amend judgment and/or to clarify judgment, be GRANTED IN PART, insofar as it requests an amendment of the judgment to reflect that the defendants are solidarily liable, and be DENIED in all other respects;

IT IS FURTHER ORDERED that the motion of defendant, Rodney "Jack" Strain, in his official capacity as Sheriff of St. Tammany Parish, for judgment as a matter of law, for new trial or, alternatively, for remittitur, be DENIED.

FOOTNOTES

[1] See, Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658, 690, 98 S.Ct. 2018, 2036 (1978).

[2] Petition for certiorari filed June 5, 2001 (No. 00-1811).

CIVIL ACTION NO. 91-2321 SECTION: E/1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

GERALD BURGE

v.

RODNEY JACK STRAIN,
in his official capacity as
Sheriff of St. Tammany Parish,
and GARY HALE

FILED MAY 1, 2001

INTERROGATORIES TO THE JURY

1. DO YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE THAT DEFENDANT GARY HALE, WHILE ACTING UNDER COLOR OF STATE LAW, DEPRIVED GERALD BURGE, OF HIS CONSTITUTIONAL RIGHTS, INCLUDING HIS RIGHT TO A FAIR TRIAL AND TO DUE PROCESS, AND THAT HALE'S ACTS WERE A LEGAL CAUSE OF DAMAGE TO BURGE?

YES X NO_____

If you answered "Yes" to Question No. 1, go to Question No. 2. If you answered "No" to Question No. 1, skip Question No. 2 and go to Question No. 3.

2. DID THE CONDUCT OF HALE, ACTING UNDER COLOR OF STATE LAW, WHICH

DEPRIVED BURGE OF HIS CONSTITUTIONAL RIGHTS, OCCUR DURING THE FOLLOWING TIME PERIODS?

A. SEPT. 1, 1980 TO AUG. 31, 1983:

YES X NO_____

B. SEPT. 1, 1983 TO AUG. 31, 1986:

YES X NO_____

C. SEPT. 1, 1986 TO PRESENT:

YES X NO_____

Go to Question No. 3.

3. DO YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE THAT DEFENDANT GARY HALE CONSPIRED WITH PERSONS WHO WERE EMPLOYED BY THE ST. TAMMANY PARISH SHERIFF'S OFFICE AND ACTING UNDER COLOR OF STATE LAW AT THE TIME OF THE CONSPIRACY, TO DEPRIVE GERALD BURGE OF HIS CONSTITUTIONAL RIGHTS, INCLUDING THE RIGHT TO A FAIR TRIAL AND DUE PROCESS, AND THAT THE ACTS OF THE CONSPIRATORS WERE THE LEGAL CAUSE OF DAMAGE TO BURGE?

YES_____ NO X

If you answered "Yes" to Question No. 3, go to Question No. 4.

If you answered "No" to Question No. 3, skip Question Nos. 4 and 5 and go to Question No. 6.

4. DID THE CONDUCT OF HALE AND OTHERS CONSPIRING WITH HIM TO DEPRIVE GERALD BURGE OF HIS CONSTITUTIONAL RIGHTS OCCUR DURING THE FOLLOWING TIME PERIODS?

A. SEPT. 1, 1980 TO AUG. 31, 1983:

YES_____ NO_____

B. SEPT. 1, 1983 TO AUG. 31, 1986:

YES_____ NO_____

C. SEPT. 1, 1986 TO PRESENT:

YES_____ NO_____

Go to Question No. 5.

5. DO YOU FIND FROM A PREPONDERANCE OF EVIDENCE THAT GARY HALE IS ENTITLED TO QUALIFIED IMMUNITY FOR ANY ACTS COMMITTED WHILE ACTING UNDER COLOR OF STATE LAW AS A DEPUTY SHERIFF OF ST. TAMMANY PARISH?

YES_____ NO_____

Go to Question No. 6.

6. DO YOU FIND FROM A PREPONDERANCE OF EVIDENCE THAT THE SHERIFF OF ST. TAMMANY PARISH, IN HIS OFFICIAL CAPACITY, FAILED TO ADEQUATELY TRAIN OR SUPERVISE HIS EMPLOYEES AND DEPUTIES IN, OR TO HAVE PROPER AND ADEQUATE POLICIES, PRACTICES, AND PROCEDURES REGARDING THE HANDLING AND TRANSMITTAL OF DOCUMENTS AND INVESTIGATIVE FILES, SO AS TO CONSTITUTE DELIBERATE INDIFFERENCE TO BURGE'S CONSTITUTIONAL RIGHTS, AND THAT THIS WAS A LEGAL CAUSE OF DAMAGE TO GERALD BURGE?

YES X NO_____

If you answered "Yes" to Question No. 6, go to Question No. 7. If you answered "No" to Question No. 6, skip Question No. 7 go to Question No. 8.

7. DID THE FAILURE OF THE SHERIFF OF ST. TAMMANY PARISH TO ADEQUATELY TRAIN HIS EMPLOYEES AND DEPUTIES OR TO HAVE PROPER AND ADEQUATE POLICIES, PRACTICES, AND PROCEDURES, REGARDING RECORD HANDLING, SO AS TO CONSTITUTE DELIBERATE INDIFFERENCE TO BURGE'S CONSTITUTIONAL RIGHTS, OCCUR DURING THE FOLLOWING TIME PERIODS?

A. SEPT. 1, 1980 TO AUG. 31, 1983:

YES_X_____ NO_____

B. SEPT. 1, 1983 TO AUG. 31, 1986:

YES_X_____ NO_____

C. SEPT. 1, 1986 TO PRESENT:

YES_X_____ NO_____

Go to Question No. 8.

8. DO YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE THAT GARY HALE INTENTIONALLY INFLICTED EMOTIONAL DISTRESS ON THE PLAINTIFF AND THAT THIS WAS A LEGAL CAUSE OF DAMAGE TO BURGE?

YES_X_____ NO

If you answered "No" to Question No. 8, skip Question No. 9 and go to Question No. 10. If you answered "Yes" to Question No. 8, go to Question No. 9.

9. DID THE CONDUCT OF GARY HALE ACTING INDIVIDUALLY IN INTENTIONALLY INFLICTING EMOTIONAL DISTRESS ON THE PLAINTIFF OCCUR DURING THE FOLLOWING TIME PERIODS?

A. SEPT. 1, 1980 TO AUG. 31. 1983:

YESX_____ NO_____

B. SEPT. 1, 1983 TO AUG. 31, 1986:

YES X NO _____

C. SEPT. 1, 1986 TO PRESENT:

YES X NO _____

Go to Question No. 10.

10. DO YOU FIND FROM A PREPONDERANCE OF EVIDENCE THAT GARY HALE CONSPIRED WITH EMPLOYEES OF THE ST. TAMMANY PARISH SHERIFF'S OFFICE, WHO WERE ACTING IN THE COURSE AND SCOPE OF THEIR EMPLOYMENT WITH THE ST. TAMMANY PARISH SHERIFF'S OFFICE AT THE TIME OF THE CONSPIRACY AND THE ACTS IN FURTHERANCE THEREOF, TO INTENTIONALLY INFLICT EMOTIONAL DISTRESS ON THE PLAINTIFF, AND THAT THIS WAS A LEGAL CAUSE OF DAMAGE TO GERALD BURGE?

YES _____ NO X

Go to Question No. 11.

11. DID THE CONDUCT OF GARY HALE AND THOSE EMPLOYEES OF THE ST. TAMMANY PARISH SHERIFF'S OFFICE, WHOM HE CONSPIRED WITH IN INTENTIONALLY INFLICTING EMOTIONAL DISTRESS ON THE PLAINTIFF, OCCUR DURING THE FOLLOWING TIME PERIODS?

A. SEPT. 1, 1980 TO AUG. 31, 1983:

YES_____ NO__X___

B. SEPT. 1, 1983 TO AUG. 31, 1986:

YES_____ NO__X___

C. SEPT. 1, 1986 TO PRESENT:

YES_____ NO__X___

If you answered "Yes" to either Question Nos. 1, 3, 6, 8, OR 10, go to Question No. 12. If you answered "No" to Question Nos. 1, 3, 6, 8, AND 10 (that is, if you answered "No" to each and every one of those questions), the foreperson should sign and date this form and hand it to the Marshal.

12. WHAT AMOUNT, IF ANY, DO YOU FIND WILL FAIRLY AND ADEQUATELY COMPENSATE PLAINTIFF, FOR THE DAMAGES WHICH HE SUSTAINED, WHICH WERE LEGALLY CAUSED BY THE DEFENDANTS, GARY HALE, AND/OR THE SHERIFF OF ST. TAMMANY PARISH?

LOSS OF FREEDOM AND IMPRISONMENT $2,000,000.00

PHYSICAL AND MENTAL PAIN AND SUFFERING, EMOTIONAL DISTRESS AND ANXIETY

$2,000,000.00

ECONOMIC LOSS DURING IMPRISONMENT $250,000.00

LEGAL EXPENSES WHICH WOULD NOT HAVE OTHERWISE BEEN INCURRED
$50,000.00

If you answered "Yes" to either Question No. 1 OR 3, go to Question No. 13. If you answered "No" to both Question Nos. 1 AND 3, AND also answered "Yes" to Question No. 6, skip Question Nos. 13 and 14, and go to Question No. 15. If you answered "No" to Question Nos. 1, 3, AND 6, the foreperson should sign and date this form and hand it to the Marshal.

13. DO YOU FIND BY A PREPONDERANCE OF EVIDENCE THAT GARY HALE ACTED WILLFULLY AND WITH MALICE, OR WITH RECKLESS INDIFFERENCE TO THE RIGHTS OF THE PLAINTIFF, AND THAT HIS CONDUCT WAS SO SHOCKING AND OFFENSIVE AS TO JUSTIFY AN AWARD OF PUNITIVE DAMAGES?

YES_____ NO__X____

If you answered "Yes" to Question No. 13, go to Question No. 14. If you answered "No" to Question No. 13, skip Question No. 14 and go to Question No. 15.

14. WHAT AMOUNT WOULD YOU ASSESS AGAINST THE DEFENDANT, GARY HALE, AS PUNITIVE DAMAGES?
$_____

If you answered "Yes" to Question No. 6, go to Question No. 15. If you answered "No" to Question No. 6, the foreperson should sign and date this form and hand it to the Marshal.

15. DO YOU FIND BY A PREPONDERANCE OF EVIDENCE THAT THE SHERIFF OF ST. TAMMANY PARISH, IN HIS OFFICIAL CAPACITY, ACTED WILLFULLY AND WITH MALICE, OR WITH RECKLESS AND DELIBERATE INDIFFERENCE TO THE RIGHTS OF THE PLAINTIFF, AND THAT THIS CONDUCT WAS SO SHOCKING AND OFFENSIVE AS TO JUSTIFY AN AWARD OF PUNITIVE DAMAGES?

YES_____ NO__X____

If you answered "Yes" to Question No. 15, go to Question No. 16. If you answered "No" to Question No. 15, the foreperson should sign and date this form and hand it to the Marshal.

16. WHAT AMOUNT WOULD YOU ASSESS AGAINST THE DEFENDANT THE SHERIFF OF ST. TAMMANY PARISH, IN HIS OFFICIAL CAPACITY, AS PUNITIVE DAMAGES?

$_____

The foreperson should sign and date this form and hand it to the Marshal.

New Orleans, Louisiana, this 10th day of May, 2001.

FOREPERSON

CIVIL ACTION NO. 91-2321 SECTION: E/1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

GERALD BURGE

v.

RODNEY JACK STRAIN,
in his official capacity as
Sheriff of St. Tammany Parish,
and GARY HALE

FILED MAY 11, 2001

INSTRUCTIONS TO THE JURY

YOU HAVE NOW HEARD ALL OF THE EVIDENCE IN THIS CASE, AS WELL AS THE CLOSING ARGUMENTS OF THE ATTORNEYS FOR THE PARTIES. I HAVE PREVIOUSLY INSTRUCTED YOU IN THE GENERAL LAW APPLICABLE TO ALL CIVIL CASES. I WILL NOW INSTRUCT YOU ON THE LAW APPLICABLE TO THIS PARTICULAR CASE. I REMIND YOU THAT IT IS YOUR DUTY NOT TO SINGLE OUT ANY ONE INSTRUCTION, BUT CONSIDER ALL INSTRUCTIONS IN DECIDING THIS CASE.

BOTH THE PARTIES AND THE PUBLIC EXPECT THAT YOU WILL CAREFULLY AND IMPARTIALLY CONSIDER ALL OF THE EVIDENCE IN THE CASE, FOLLOW THE LAW

AS STATED BY THE COURT, AND REACH A FAIR AND JUST VERDICT.

I REMIND THAT IN THIS CASE, AS IN ALL CIVIL CASES, THE PLAINTIFF MUST PROVE EVERY ESSENTIAL PART OF HIS CLAIM BY A PREPONDERANCE OF THE EVIDENCE. A PREPONDERANCE OF THE EVIDENCE MEANS EVIDENCE THAT PERSUADES YOU THAT A CLAIM IS MORE LIKELY TRUE THAN NOT TRUE. IF THE PROOF FAILS TO ESTABLISH ANY ESSENTIAL PART OF THE PLAINTIFF'S CLAIM BY A PREPONDERANCE OF THE EVIDENCE, YOU SHOULD FIND FOR THE DEFENDANT AS TO THAT CLAIM.

THE MERE FACT THAT A PERSON HAS BROUGHT A LAWSUIT AND IS IN COURT SEEKING MONEY DAMAGES CREATES NO INFERENCE THAT HE IS ENTITLED TO A JUDGMENT FOR ANY AMOUNT AT ALL. ANYONE CAN MAKE A CLAIM, AND THE FACT OF MAKING A CLAIM IN NO WAY TENDS TO ESTABLISH IT.

IN THIS CASE, THE PLAINTIFF, GERALD BURGE, CONTENDS THAT GARY HALE, INDIVIDUALLY, DEPRIVED HIM OF HIS FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW AND A FAIR TRIAL, WHILE ACTING UNDER COLOR OF STATE LAW, BY SUPPRESSING EVIDENCE WHICH WOULD HAVE TENDED TO EXCULPATE HIM, AND BY SUBORNING PERJURY. FOR YOUR INFORMATION, TO "SUBORN PERJURY" MEANS

TO INDUCE A PERSON TO COMMIT PERJURY, OR TO LIE UNDER OATH, OR TO OBTAIN PERJURED TESTIMONY FROM ANOTHER. HE ALSO CONTENDS THAT GARY HALE CONSPIRED WITH PERSONS EMPLOYED BY THE ST. TAMMANY PARISH SHERIFF'S OFFICE, WHO WERE ACTING UNDER COLOR OF STATE LAW, TO DEPRIVE HIM OF HIS FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW AND A FAIR TRIAL, BY SUPPRESSING EXCULPATORY EVIDENCE AND SUBORNING PERJURY. HE CONTENDS THAT THE SHERIFF OF ST. TAMMANY PARISH FAILED TO ADEQUATELY TRAIN AND SUPERVISE HIS EMPLOYEES REGARDING RECORD KEEPING AND TRANSMITTAL OF INVESTIGATORY FILES, AND THAT HIS POLICIES, PRACTICES, AND PROCEDURES IN THIS REGARD WERE SO DEFICIENT AS TO AMOUNT TO DELIBERATE INDIFFERENCE TO GERALD BURGE'S FEDERAL CONSTITUTIONAL RIGHTS. GERALD BURGE FURTHER CONTENDS THAT GARY HALE, ACTING ALONE OR IN A CONSPIRACY WITH PERSONS ACTING IN THE COURSE AND SCOPE OF THEIR EMPLOYMENT BY THE SHERIFF, ACTED IN AN EXTREME AND OUTRAGEOUS MANNER IN DEPRIVING HIM OF HIS RIGHTS, SO AS TO AMOUNT TO AN INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS. PLAINTIFF SEEKS PUNITIVE DAMAGES FROM HALE AND FROM THE SHERIFF.

THE SHERIFF DENIES THAT HIS POLICIES, PRACTICES OR PROCEDURES REGARDING RECORD KEEPING AND TRANSMITTAL OF INVESTIGATORY FILES WERE FAULTY OR INSUFFICIENT, OR THAT HE FAILED TO ADEQUATELY TRAIN OR SUPERVISE HIS EMPLOYEES IN THIS MANNER. HE DENIES THAT HIS OFFICE PROCEDURES, POLICIES, AND TRAINING WERE INADEQUATE OR THAT THEY AMOUNTED TO DELIBERATE INDIFFERENCE TO THE PLAINTIFF'S CONSTITUTIONAL RIGHTS. HE DENIES THAT ANY PERSON EMPLOYED BY THE SHERIFF'S OFFICE ACTING UNDER COLOR OF STATE LAW, ACTED IN CONSPIRACY WITH HALE TO DEPRIVE THE PLAINTIFF OF HIS CONSTITUTIONAL RIGHTS. THE SHERIFF CONTENDS THAT THE DISTRICT ATTORNEY'S FAILURE TO PROVIDE THE WITNESS'S EXCULPATORY STATEMENT TO BURGE'S ATTORNEY BEFORE OR DURING THE PLAINTIFF'S 1986 MURDER TRIAL WAS IN NO WAY CAUSED OR CONTRIBUTED TO BY THE ST. TAMMANY PARISH SHERIFF, OR ANY OF HIS EMPLOYEES OR PERSONS ACTING UNDER COLOR OF HIS OFFICE.

THE PLAINTIFF BRINGS THE FOLLOWING CLAIMS AGAINST THE DEFENDANT, GARY HALE:

1) A CLAIM UNDER 42 U.S.C. § 1983 FOR VIOLATING THE PLAINTIFF'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS

OF LAW AND FAIR TRIAL BY KNOWINGLY FAILING TO TURN OVER THE STATEMENT OF JEAN FRIERSON, THE MURDER VICTIM'S MOTHER, TO THE PROSECUTING ATTORNEY, AND BY SUBORNING PERJURY;

2) A CLAIM UNDER 42 U.S.C. § 1983 FOR CONSPIRING WITH PERSONS EMPLOYED BY THE ST. TAMMANY PARISH SHERIFF'S OFFICE TO DEPRIVE HIM OF HIS FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL BY KNOWINGLY FAILING TO TURN OVER THE STATEMENT OF JEAN FRIERSON AND BY SUBORNING PERJURY;

3) A CLAIM FOR PUNITIVE DAMAGES UNDER 42 U.S.C. § 1983 FOR EXTREME AND OUTRAGEOUS CONDUCT AMOUNTING TO RECKLESS INDIFFERENCE TO THE PLAINTIFF'S RIGHTS;

4) A CLAIM UNDER LOUISIANA LAW FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

THE PLAINTIFF BRINGS THE FOLLOWING CLAIMS AGAINST THE DEFENDANT, RODNEY JACK STRAIN, IN HIS OFFICIAL CAPACITY AS SHERIFF OF ST. TAMMANY PARISH:

1) A CLAIM UNDER 42 U.S.C. § 1983 FOR FAILING TO ADEQUATELY TRAIN OR SUPERVISE HIS EMPLOYEES AND IN FAILING TO HAVE AN ADEQUATE AND

PROPER POLICY, PRACTICE AND PROCEDURE, IN THE MAINTENANCE AND TRANSMITTAL OF RECORDS AND INVESTIGATORY FILES, SUCH FAILURE AMOUNTING TO DELIBERATE INDIFFERENCE TO PLAINTIFF'S CONSTITUTIONAL RIGHTS;

2) A CLAIM UNDER LOUISIANA LAW FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS BY HIS EMPLOYEES ACTING IN CONSPIRACY WITH HALE;

3) A CLAIM UNDER 42 U.S.C. § 1983 FOR PUNITIVE DAMAGES FOR EXTREME AND OUTRAGEOUS CONDUCT AMOUNTING TO RECKLESS INDIFFERENCE TO THE PLAINTIFF'S RIGHTS.

THE JURY WILL DETERMINE WHETHER OR NOT THE PLAINTIFF SUCCEEDS ON ANY ONE OF HIS CLAIMS.

THE PLAINTIFF CLAIMS THAT DEFENDANT HALE, WHILE ACTING UNDER THE COLOR OF AUTHORITY OF THE STATE OF LOUISIANA, PARISH OF ST. TAMMANY, INTENTIONALLY VIOLATED HIS CONSTITUTIONAL RIGHTS BY DEPRIVING HIM OF THE RIGHT TO A FAIR TRIAL AND THE RIGHT NOT TO BE DEPRIVED OF LIBERTY WITHOUT DUE PROCESS OF LAW.

UNDER THE CONSTITUTION OF THE UNITED STATES, A PERSON BEING PROSECUTED FOR A CRIME HAS A RIGHT TO A FAIR TRIAL AND A RIGHT NOT - TO BE DEPRIVED OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW. ONE OF A CRIMINAL DEFENDANT'S DUE PROCESS RIGHTS IS THAT THE PROSECUTOR MUST TURN OVER TO THE DEFENDANT'S ATTORNEY ANY EVIDENCE FAVORABLE TO THE ACCUSED WHICH IS MATERIAL TO HIS GUILT OR PUNISHMENT OR WHICH COULD IMPEACH, OR CONTRADICT, THE WITNESS WITH A FORMER STATEMENT OF THE WITNESS. THIS IS KNOWN AS THE BRADY RULE AND THE EVIDENCE, WHICH IS REFERRED TO AS EXCULPATORY EVIDENCE, IS KNOWN AS BRADY EVIDENCE. EVEN IF THE EVIDENCE IS NOT IN THE POSSESSION OF THE PROSECUTOR, BUT IS IN THE POSSESSION OF ANY OTHER PERSON ACTING ON BEHALF OF THE GOVERNMENT IN THE CASE, INCLUDING THE POLICE OR SHERIFF'S OFFICE, THE PROSECUTOR IS BOUND TO TURN IT OVER AND IF THE EVIDENCE IS NOT TURNED OVER, THE DEFENDANT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL IS VIOLATED. IT IS THE SHERIFF'S DUTY TO TURN OVER ALL RECORDS AND INVESTIGATORY FILES ON CRIMES BEING INVESTIGATED TO THE DISTRICT ATTORNEY UPON REQUEST.

IT IS, HOWEVER, THE JOB OF THE PROSECUTOR TO DECIDE WHAT IS AND WHAT IS NOT BRADY MATERIAL AND TO TURN IT OVER TO THE DEFENSE. ALL PROSECUTORIAL

AND TRIAL DECISIONS, SUCH AS WHETHER TO CHARGE A PERSON WITH A CRIME, WHETHER TO SEEK AN INDICTMENT OF A PERSON, WHETHER TO PROCEED TO TRIAL, WHETHER TO TURN OVER DOCUMENTS DURING A TRIAL, AND WHETHER TO OFFER IMMUNITY TO A WITNESS, ARE WITHIN THE PROVINCE OF THE PROSECUTOR, NOT THE SHERIFF OR THE POLICE, AND ARE MADE BY THE PROSECUTOR.

IN THIS CASE, BURGE'S ATTORNEY DID NOT RECEIVE THE STATEMENT OF JEAN FRIERSON, THE MURDER VICTIM'S MOTHER, EITHER BEFORE OR DURING HIS 1986 TRIAL. THE STATE JUDGE REVIEWING BURGE'S CONVICTION DETERMINED THAT HIS DUE PROCESS RIGHTS WERE VIOLATED BY THE PROSECUTOR'S FAILURE TO TURN OVER THE STATEMENT TO HIS ATTORNEY AND ORDERED THAT GERALD BURGE BE GRANTED A NEW TRIAL.

SECTION 1983 OF TITLE 42 OF THE UNITED STATES CODE PROVIDES THAT ANY CITIZEN MAY SEEK REDRESS IN THIS COURT BY WAY OF DAMAGES AGAINST ANY PERSON WHO, UNDER COLOR OF STATE LAW OR CUSTOM, INTENTIONALLY DEPRIVES THAT CITIZEN OF ANY RIGHTS, PRIVILEGES, OR IMMUNITIES SECURED OR PROTECTED BY THE CONSTITUTION OR LAWS OF THE UNITED STATES.

IN ORDER TO PROVE HIS CLAIM UNDER THIS STATUTE, THE PLAINTIFF MUST

ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE EACH OF THE FOLLOWING ELEMENTS:

1. THE DEFENDANT INTENTIONALLY COMMITTED ACTS THAT VIOLATED ONE OR MORE OF THE PLAINTIFF'S RIGHTS SECURED BY THE CONSTITUTION OF THE UNITED STATES;

2. THAT IN SO DOING THE DEFENDANT ACTED "UNDER COLOR" OF THE AUTHORITY OF THE STATE OF LOUISIANA;

3. THE DEFENDANT'S ACTS WERE THE LEGAL CAUSE OF PLAINTIFF'S DAMAGES.

STATE OR LOCAL OFFICIALS ACT "UNDER COLOR" OF THE AUTHORITY OF THE STATE WHEN THEY ACT WITHIN THE LIMITS OF THEIR LAWFUL AUTHORITY. HOWEVER, THEY ALSO ACT "UNDER COLOR" OF THE AUTHORITY OF THE STATE WHEN THEY ACT WITHOUT LAWFUL AUTHORITY OR BEYOND THE BOUNDS OF THEIR LAWFUL AUTHORITY IF THEIR ACTS ARE DONE WHILE OFFICIALS ARE PURPORTING OR PRETENDING TO ACT IN THE PERFORMANCE OF THEIR OFFICIAL DUTIES. AN OFFICIAL ACTS "UNDER COLOR" OF STATE AUTHORITY IF HE ABUSES OR MISUSES A POWER THAT HE POSSESSES ONLY BECAUSE HE IS AN OFFICIAL.

YOU WILL HAVE TO DECIDE WHETHER GARY HALE WAS ACTING "UNDER COLOR" OF STATE AUTHORITY AT THE TIME VARIOUS EVENTS OCCURRED WHICH PLAINTIFF ALLEGES WERE ACTIONS WHICH DEPRIVED HIM OF HIS CONSTITUTIONAL RIGHTS.

MISUSE OF POWER, POSSESSED BY VIRTUE OF STATE LAW AND MADE POSSIBLE ONLY BECAUSE THE ACTOR IS CLOTHED WITH THE AUTHORITY OF STATE LAW, IS ACTION TAKEN "UNDER COLOR" OF STATE LAW. "UNDER COLOR OF STATE LAW" MEANS UNDER THE "PRETENSE" OF LAW, AND INCLUDES ACTS OF OFFICERS WHO UNDERTAKE TO PERFORM THEIR OFFICIAL DUTIES WHETHER THEY ACT IN ACCORDANCE WITH THE LINE OF AUTHORITY OR STE OVER IT. ACTS OF OFFICERS DONE IN FURTHERANCE OF PURELY PERSONA PURSUITS ARE PLAINLY EXCLUDED, HOWEVER, AND ARE NOT DONE "UNDE COLOR" OF STATE LAW. WHETHER A LAW ENFORCEMENT OFFICER IS ACTIN UNDER COLOR OF STATE LAW DOES NOT DEPEND ON DUTY STATUS AT THE TIME OF THE ALLEGED VIOLATION, BUT WHETHER THE PERSON IS UNDERTAKING TO PERFORM HIS OFFICIAL DUTY WHILE CLOTHED WITH AUTHORITY OF STATI LAW.

IN THIS CASE, YOU ARE INSTRUCTED THAT PRIOR TO THE SUMMER OF 1981, DEFENDANT HALE WAS EMPLOYED AS A DETECTIVE IN

THE ST. TAMMANY PARISH SHERIFF'S OFFICE AND WAS ASSIGNED TO INVESTIGATE THE MURDEF OF DOUGLAS FRIERSON. PRIOR TO THE SUMMER OF 1981, DEFENDANT HALE WAS ACTING UNDER COLOR OF STATE LAW. HOWEVER, SOMETIME DURING MAY 1981, HALE LEFT THE ST. TAMMANY PARISH SHERIFF'S OFFICE. FOR ANY ACTIONS BY HALE AFTER MAY 1981, YOU WILL HAVE TO DETERMINE WHETHER THOSE ACTIONS WERE DONE "UNDER COLOR" OF STATE LAW, SINCE HE WAS NO LONGER EMPLOYED AS A LAW ENFORCEMENT OFFICER BY THE ST. TAMMANY ?ARISH SHERIFF'S OFFICE AND THUS HAD NO OFFICIAL DUTIES TO PERFORM ?OR THE SHERIFF.

PLAINTIFF'S SECOND CLAIM AGAINST GARY HALE ALSO ARISES UNDER 42.U.S.C. § 1983, WHICH PROVIDES THAT A PERSON CAN RECOVER DAMAGES FROM DEFENDANTS WHO CONSPIRE FOR THE PURPOSE OF DEPRIVING THE PLAINTIFF OF ONE OF THE RIGHTS, PRIVILEGES, OR IMMUNITIES SECURED TO HIM BY THE CONSTITUTION OF THE UNITED STATES.

IN ORDER TO ESTABLISH A CLAIM AGAINST GARY HALE FOR CONSPIRACY TO DEPRIVE THE PLAINTIFF OF HIS CONSTITUTIONAL RIGHTS, THE PLAINTIFF MUST PROVE THAT:

(1) THE DEFENDANT DID CONSPIRE WITH ONE OR MORE PERSONS;

(2) WITH THE INTENT;

(3) TO DEPRIVE THE PLAINTIFF OF HIS CONSTITUTIONAL RIGHTS;

(4) THAT ONE OR MORE OF THE CONSPIRATORS DID, OR CAUSED TO BE DONE, ANY ACT IN FURTHERANCE OF THE OBJECT OF THE CONSPIRACY;

(5) THAT THERE WAS AN ACTUAL VIOLATION OF 42 U.S.C. § 1983, THAT IS, THAT ONE OF THE CONSPIRATORS, ACTING UNDER COLOR OF STATE LAW, DID DEPRIVE THE PLAINTIFF OF ONE OF HIS CONSTITUTIONAL RIGHTS, AND

(6) THAT THE PLAINTIFF SUFFERED DAMAGE LEGALLY CAUSED BY THE ACTS OF THE DEFENDANTS WHO CONSPIRED TO DEPRIVE HIM OF HIS CONSTITUTIONAL RIGHTS.

THE RIGHT OF A CITIZEN TO A FAIR TRIAL AND NOT TO BE DEPRIVED OF HIS RIGHT TO LIBERTY WITHOUT DUE PROCESS OF LAW ARE RIGHTS AND PRIVILEGES OF CITIZENS OF THE UNITED STATES SECURED TO THEM BY THE CONSTITUTION.

A COMBINATION OR CONSPIRACY IS FORMED WHEN TWO OR MORE PERSONS KNOWINGLY JOIN TOGETHER TO

ACCOMPLISH SOME UNLAWFUL PURPOSE BY JOINT ACTION. A PERSON ACTS KNOWINGLY IF HE ACTS VOLUNTARILY AND INTENTIONALLY, AND NOT BY MISTAKE OR ACCIDENT. THE ESSENCE OF A CONSPIRACY IS AN AGREEMENT BETWEEN TWO OR MORE PERSONS TO VIOLATE OR DISREGARD THE LAW. THIS DOES NOT MEAN THAT THE MEMBERS OF AN ALLEGED CONSPIRACY MUST ENTER INTO ANY FORMAL AGREEMENT. THE REQUIRED COMBINATION OR CONSPIRACY MAY BE ESTABLISHED BY SHOWING THAT THE DEFENDANT OR DEFENDANTS KNOWINGLY CAME TO A COMMON AND MUTUAL UNDERSTANDING TO ACCOMPLISH OR ATTEMPT TO ACCOMPLISH AN UNLAWFUL PURPOSE. A CONSPIRACY CANNOT BE FORMED UNLESS AT LEAST TWO SEPARATE PERSONS REACH AN AGREEMENT OR UNDERSTANDING. A CONSPIRACY CAN BE PROVEN BY CIRCUMSTANTIAL EVIDENCE.

IF YOU FIND THAT A CONSPIRACY EXISTED WHICH DEPRIVED THE PLAINTIFF OF RIGHTS GUARANTEED BY THE CONSTITUTION, THE ELEMENTS OF WHICH I HAVE EXPLAINED TO YOU, THEN EACH MEMBER OF THE CONSPIRACY IS LIABLE FOR THE VIOLATION OF THE PLAINTIFF'S RIGHTS. ALL MEMBERS OF AN ALLEGED CONSPIRACY UNDER 42 U.S.C. § 1983 NEED NOT BE STATE ACTORS OR CHARGED IN THE SAME CAPACITY, AND ONE OF THE

CONSPIRATORS CAN BE ABSOLUTELY IMMUNE FROM LIABILITY. HOWEVER, IN ORDER TO FIND A DEFENDANT GUILTY OF A CONSPIRACY UNDER 42 U.S.C. § 1983, YOU MUST FIND THAT THERE WAS A VIOLATION OF 42 U.S.C. § 1983, THAT IS, THAT A PERSON ACTING UNDER COLOR OF STATE LAW DEPRIVED THE PLAINTIFF OF HIS CONSTITUTIONAL RIGHTS.

YOU ARE ALSO INSTRUCTED THAT UNDER 42 U.S.C. § 1983, THE SHERIFF IN HIS OFFICIAL CAPACITY IS NOT LIABLE FOR THE VIOLATIONS OF HIS DEPUTIES SIMPLY BECAUSE HE IS THE SHERIFF.

IF THE SHERIFF HIMSELF PERSONALLY OR INDIVIDUALLY, ACTING UNDER COLOR OF STATE LAW, VIOLATES A CITIZENS RIGHTS, HE MAY BE HELD LIABLE. HOWEVER, THE SHERIFF IN HIS OFFICIAL CAPACITY IS NOT VICARIOUSLY LIABLE FOR PARTICIPATION IN A CONSPIRACY BY ONE OF HIS DEPUTIES IN VIOLATION OF 42 U.S.C. § 1983.

THE ONLY TWO DEFENDANTS IN THIS ACTION ARE GARY HALE AND THE SHERIFF IN HIS OFFICIAL CAPACITY. NO OTHER DEPUTY OR SHERIFF'S OFFICE EMPLOYEE IS A DEFENDANT IN THIS CASE.

IF YOU FIND THAT THE PLAINTIFF HAS PROVEN HIS CLAIM AGAINST HALE WHILE

ACTING UNDER COLOR OF STATE LAW, YOU MUST THEN CONSIDER HALE 'S DEFENSE THAT HIS CONDUCT WAS OBJECTIVELY REASONABLE IN LIGHT OF THE LEGAL RULES CLEARLY ESTABLISHED AT THE TIME OF THE INCIDENT IN ISSUE AND THAT HE IS THEREFORE NOT LIABLE.

LAW ENFORCEMENT OFFICERS ARE PRESUMED TO KNOW ABOUT THE CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS OF CITIZENS. HERE, IT IS CLEARLY ESTABLISHED THAT CITIZENS HAVE THE CONSTITUTIONAL RIGHT TO A FAIR TRIAL AND NOT TO BE DEPRIVED OF THEIR LIBERTY WITHOUT DUE PROCESS OF LAW, AND THAT LAW ENFORCEMENT OFFICERS HAVE A DUTY NOT TO SUBORN PERJURY. PART OF THE RIGHT TO DUE PROCESS OF LAW IS THAT THE DEFENDANT IS ENTITLED TO BE PROVIDED WITH EXCULPATORY BRADY MATERIAL BY THE GOVERNMENT THROUGH THE PROSECUTOR, WHO RECEIVES THE INVESTIGATORY FILE MATERIALS FROM THE SHERIFF'S OFFICE.

IF, AFTER CONSIDERING THE SCOPE OF DISCRETION AND RESPONSIBILITY GENERALLY GIVEN TO LAW ENFORCEMENT OFFICERS IN THE PERFORMANCE OF THEIR DUTIES, AND AFTER CONSIDERING ALL OF THE SURROUNDING CIRCUMSTANCES OF THE CASE AS THEY WOULD HAVE REASONABLY APPEARED AT THE TIME, YOU FIND FROM A PREPONDERANCE OF

THE EVIDENCE THAT PLAINTIFF HAS PROVED EITHER (1) HALE WAS PLAINLY INCOMPETENT OR THAT (2) HALE KNOWINGLY VIOLATED THE LAW REGARDING THE PLAINTIFF'S CONSTITUTIONAL RIGHTS, YOU MUST FIND FOR THE PLAINTIFF. IF, HOWEVER, YOU FIND THAT HALE HAD A REASONABLE BELIEF THAT HIS ACTIONS DID NOT VIOLATE THE CONSTITUTIONAL RIGHTS OF THE PLAINTIFF, THEN YOU CANNOT FIND HALE LIABLE EVEN IF THE PLAINTIFF'S RIGHTS WERE IN FACT VIOLATED AS A RESULT OF HALE'S OBJECTIVELY REASONABLE ACTION.

THE DEFENSE OF QUALIFIED IMMUNITY IS NOT AVAILABLE TO THE SHERIFF IN HIS OFFICIAL CAPACITY, BUT ONLY TO INDIVIDUAL LAW ENFORCEMENT OFFICERS.

PLAINTIFF'S THIRD CLAIM UNDER 42 U.S.C. § 1983 IS AGAINST RODNEY JACK STRAIN, IN HIS OFFICIAL CAPACITY AS THE SHERIFF OF ST. TAMMANY PARISH. SHERIFF STRAIN WAS NOT THE SHERIFF AT THE TIME OF THE EVENTS IN QUESTION. HE IS THE SUCCESSOR IN OFFICE TO PATRICK CANULETTE, WHO WAS FORMERLY THE SHERIFF OF ST. TAMMANY PARISH. SHERIFF STRAIN IS NOT SUED PERSONALLY OR INDIVIDUALLY. HE IS SUED IN HIS OFFICIAL CAPACITY AS SHERIFF AND IS RESPONSIBLE IN HIS

OFFICIAL CAPACITY FOR THE FAILURE OF HIS PREDECESSOR IN OFFICE UNDER § 1983, IF YOU FIND FOR THE PLAINTIFF ON THIS CLAIM.

TO RECOVER AGAINST THE SHERIFF IN HIS OFFICIAL CAPACITY, THE PLAINTIFF MUST SHOW THAT THE SHERIFF OF ST. TAMMANY PARISH HAD A LEGAL DUTY TO ACT TO PREVENT THE MISDEEDS OF HIS EMPLOYEES AND DEPUTIES AND THAT THE SHERIFF'S FAILURE TO ACT AMOUNTED TO GROSS NEGLIGENCE OR DELIBERATE INDIFFERENCE TO PLAINTIFF'S RIGHTS.

AS I HAVE ALREADY EXPLAINED TO YOU, THE SHERIFF IN HIS OFFICIAL CAPACITY CANNOT BE HELD LIABLE FOR CONSTITUTIONAL VIOLATIONS UNDER § 1983 SIMPLY BECAUSE ONE OF HIS EMPLOYEES OR DEPUTIES VIOLATED THE PLAINTIFF'S CONSTITUTIONAL RIGHTS. THE SHERIFF IN HIS OFFICIAL CAPACITY IS LIABLE UNDER § 1983 FOR THE DEPRIVATION OF THE PLAINTIFF'S CONSTITUTIONAL RIGHTS ONLY IF THE DEPRIVATION OF THE PLAINTIFF'S CONSTITUTIONAL RIGHTS WAS PURSUANT TO A GOVERNMENTAL CUSTOM, POLICY, ORDINANCE, REGULATION OR DECISION.

TO ESTABLISH THAT THE PLAINTIFF'S CONSTITUTIONAL DEPRIVATION WAS DUE TO THE OFFICIAL POLICY, PRACTICE, OR PROCEDURE OF THE SHERIFF'S OFFICE,

THE PLAINTIFF MAY PROVE THIS OFFICIAL POLICY IN ONE OF THREE WAYS:

1) WHEN THE SHERIFF PROMULGATES A GENERALLY APPLICABLE STATEMENT OF POLICY AND THE SUBSEQUENT ACT COMPLAINED OF IS SIMPLY AN IMPLEMENTATION OF THAT POLICY;

2) WHERE NO OFFICIAL POLICY WAS ANNOUNCED, ADOPTED, OR PROMULGATED, BUT THERE IS PROOF OF A PERSISTENT, WIDESPREAD PRACTICE OF GOVERNMENT OFFICIALS OR EMPLOYEES, WHICH, ALTHOUGH NOT AUTHORIZED BY OFFICIALLY ADOPTED AND PROMULGATED POLICY, IS SO COMMON AND WELL SETTLED AS TO CONSTITUTE A CUSTOM THAT FAIRLY REPRESENTED GOVERNMENT POLICY. ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF SUCH CUSTOM MUST BE ATTRIBUTABLE TO THE GOVERNMENTAL BODY OR TO AN OFFICIAL TO WHOM THAT GOVERNMENTAL BODY HAD DELEGATED POLICY-MAKING AUTHORITY; OR

3) EVEN IF THE SHERIFF FAILS TO ACT AFFIRMATIVELY AT ALL, IF THE NEED TO TAKE SOME ACTION TO CONTROL THE AGENTS OF THE SHERIFF IS SO OBVIOUS, AND THE INADEQUACY OF THE EXISTING PRACTICE IS SO LIKELY TO RESULT IN THE VIOLATION OF CONSTITUTIONAL RIGHTS, THAT THE SHERIFF CAN REASONABLY BE

SAID TO BE INDIFFERENT TO THE NEED. THUS, ONLY WHERE THE SHERIFF'S FAILURE TO TRAIN HIS EMPLOYEES EVIDENCES "A DELIBERATE INDIFFERENCE" TO THE RIGHTS OF THE CITIZENS, CAN THE SHERIFF'S FAILURE AMOUNT TO A POLICY, PRACTICE OR PROCEDURE TO SUBJECT HIM TO LIABILITY UNDER § 1983. THIS STANDARD REQUIRES THAT YOU FIND THAT THE SUPERIOR OFFICIAL MADE AN INTENTIONAL CHOICE, NOT MERELY A NEGLIGENT OVERSIGHT, TO ESTABLISH LIABILITY.

PROOF OF MORE THAN A SINGLE INSTANCE OF THE LACK OF TRAINING OR SUPERVISION CAUSING A VIOLATION OF CONSTITUTIONAL RIGHTS IS NORMALLY REQUIRED BEFORE SUCH LACK OF TRAINING OR SUPERVISION CONSTITUTES DELIBERATE INDIFFERENCE. THE PLAINTIFF MUST GENERALLY DEMONSTRATE AT LEAST A PATTERN OF SIMILAR VIOLATIONS. THE INADEQUACY OF TRAINING MUST BE OBVIOUS OR OBVIOUSLY LIKELY TO RESULT IN A CONSTITUTIONAL VIOLATION.

HOWEVER, A SINGLE DECISION BY A POLICY MAKER CAN, UNDER CERTAIN CIRCUMSTANCES, CONSTITUTE A POLICY FOR WHICH A SUPERIOR DFFICER CAN BE HELD LIABLE. IN ORDER FOR A SINGLE INSTANCE TO CONSTITUTE A POLICY

RENDERING THE SUPERIOR OFFICIAL LIABLE, THERE MSUT BE EVIDENCE THAT THE SUPERIOR OFFICIAL ACTED WITH DELIBERATE INDIFFERENCE TO THE KNOWN OR OBVIOUS CONSEQUENCES OF HIS ACTION, WHICH IS A STRINGENT STANDARD. A SHOWING OF SIMPLE OR EVEN HEIGHTENED NEGLIGENCE WILL NOT SUFFICE. FURTHER, THE PLAINTIFF MUST SHOW THAT THE POLICY OR DECISION HE OBJECTS TO WAS THE MOVING FORCE BEHIND HIS INJURY.

PLAINTIFF'S NEXT CLAIM AGAINST HALE AND THE SHERIFF OF ST. TAMMANY PARISH ARISES UNDER LOUISIANA LAW AND IS FOR THE INTENTIONAL TORT OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS. AN INTENTIONAL TORT, IN THIS CONTEXT, MEANS THE PURPOSE OR STATE OF MIND WITH WHICH A PERSON ACTS. INTENT MEANS THAT THE ACTOR EITHER (1) CONSCIOUSLY DESIRES THE RESULT OF HIS ACTIONS OR (2) KNOWS THAT THE RESULT IS SUBSTANTIALLY CERTAIN TO FOLLOW FROM HIS ACTIONS. A DEFENDANT WHO IS GUILTY OF AN INTENTIONAL TORT IS LIABLE FOR ALL OF THE CONSEQUENCES OF HIS ACTIONS, EVEN THOSE WHICH HE DID NOT ACTUALLY INTEND OR WHICH WERE NOT REASONABLY FORESEEABLE. AN ACTOR INTENDS SOMETHING WHEN HE SUBJECTIVELY WANTS IT TO HAPPEN, OR WHEN HE MUST HAVE REALIZED TO A

VIRTUAL CERTAINTY THAT IT WOULD HAPPEN. "SUBSTANTIALLY CERTAIN" MEANS "VIRTUALLY SURE" OR "REALLY INEVITABLE." YOU SHOULD DETERMINE WHETHER THE DEFENDANT KNEW THERE WAS ALMOST NO CHANCE THAT HARMFUL CONSEQUENCES WOULD NOT OCCUR.

UNDER LOUISIANA LAW, A PERSON WHO INTENTIONALLY OR RECKLESSLY CAUSES SEVERE EMOTIONAL DISTRESS TO ANOTHER BY VIRTUE OF EXTREME AND OUTRAGEOUS CONDUCT IS LIABLE FOR THAT EMOTIONAL DISTRESS AND FOR ANY BODILY HARM AS A RESULT.

BY EXTREME AND OUTRAGEOUS CONDUCT, I MEAN CONDUCT WHICH IS SO OUTRAGEOUS IN CHARACTER, AND SO EXTREME IN DEGREE, AS TO GO BEYOND ALL POSSIBLE BOUNDS OF DECENCY AND IS TO BE REGARDED AS ATROCIOUS AND UTTERLY INTOLERABLE IN A CIVILIZED COMMUNITY.

THE PLAINTIFF ALSO CLAIMS THAT HALE CONSPIRED WITH EMPLOYEES AND DEPUTIES OF THE ST. TAMMANY PARISH SHERIFF'S OFFICE TO COMMIT THE INTENTIONAL TORT OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

UNDER LOUISIANA LAW, ANY PERSON WHO CONSPIRES WITH - ANOTHER TO COMMIT AN INTENTIONAL OR WILLFUL ACT, IS

LIABLE ALONG WITH HIS CO-CONSPIRATOR FOR THE DAMAGE CAUSED BY THE INTENTIONAL ACT. THUS, TO DETERMINE WHETHER OR NOT HALE CONSPIRED WITH ANOTHER PERSON TO COMMIT THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, YOU MUST FIRST FIND THAT ONE OF THE CONSPIRATORS INTENTIONALLY OR RECKLESSLY CAUSED SEVERE EMOTIONAL DISTRESS TO THE PLAINTIFF BY VIRTUE OF EXTREME AND OUTRAGEOUS CONDUCT.

I REMIND YOU THAT BY EXTREME AND OUTRAGEOUS CONDUCT, I MEAN CONDUCT WHICH IS SO OUTRAGEOUS IN CHARACTER, AND SO EXTREME IN DEGREE, AS TO GO BEYOND ALL POSSIBLE BOUNDS OF DECENCY AND IS TO BE REGARDED AS ATROCIOUS AND UTTERLY INTOLERABLE IN A CIVILIZED COMMUNITY.

NEXT YOU MUST DETERMINE WHETHER THERE WAS A CONSPIRACY. I REMIND YOU THAT TO FIND THAT DEFENDANT HALE CONSPIRED WITH OTHERS TO COMMIT AN INTENTIONAL TORT, YOU MUST FIND:

(1) THE DEFENDANT DID CONSPIRE WITH ONE OR MORE PERSONS;

(2) WITH THE INTENT;

(3) TO INFLICT SEVERE EMOTIONAL DISTRESS ON THE PLAINTIFF;

(4) THAT ONE OR MORE OF THE CONSPIRATORS DID, OR CAUSED TO BE DONE, ANY ACT IN FURTHERANCE OF THE OBJECT OF THE CONSPIRACY;

(5) THAT SEVERE EMOTIONAL DISTRESS WAS INFLICTED UPON THE PLAINTIFF;

(6) THAT THE PLAINTIFF SUFFERED DAMAGE LEGALLY CAUSED BY THE ACTS OF THE DEFENDANTS WHO CONSPIRED TO INFLICT EXTREME EMOTIONAL DISTRESS UPON HIM.

PLAINTIFF CLAIMS THAT ONE OR MORE OF HIS CO-CONSPIRATORS WAS ACTING IN THE COURSE AND SCOPE OF HIS EMPLOYMENT AS ST. TAMMANY PARISH SHERIFF'S OFFICE DEPUTIES AT THE TIME OF THE CONSPIRACY. IN MAKING THIS ALLEGATION, PLAINTIFF SEEKS TO IMPOSE LIABILITY FOR THE ACTS OF HIS ALLEGED CO-CONSPIRATORS WHOM HE ALLEGES WERE ACTING IN THE COURSE AND SCOPE OF THEIR EMPLOYMENT WITH THE ST. TAMMANY PARISH SHERIFF'S OFFICE AT THE TIME THEY CONSPIRED OR COMMITTED ACTS IN FURTHERANCE OF THE CONSPIRACY.

THE LAW IS DIFFERENT WITH RESPECT TO THE IMPOSITION OF LIABILITY AGAINST

SUPERIORS OR EMPLOYERS ON CLAIMS OF INTENTIONAL ACTS BROUGHT UNDER STATE LAW THAN THE LAW FOR THE IMPOSITION OF VICARIOUS LIABILITY UNDER 42 U.S.C. § 1983. UNDER STATE LAW, SUPERIOR OFFICIALS OR EMPLOYERS ARE LIABLE FOR THE DAMAGES CAUSED BY THE INTENTIONAL ACTS OF THEIR EMPLOYEES OR SUBORDINATES, IF THE INCIDENT OCCURRED WHILE THE EMPLOYEE IS EXERCISING THE FUNCTIONS FOR WHICH HE WAS EMPLOYED. THIS MEANS THAT THE EMPLOYEE'S ACTIONS MUST HAVE BEEN SO CLOSELY CONNECTED IN TIME, PLACE AND CAUSATION TO HIS EMPLOYMENT DUTIES AS TO BE REGARDED A RISK OF HARM FAIRLY ATTRIBUTABLE TO THE EMPLOYER'S BUSINESS, AS COMPARED WITH CONDUCT MOTIVATED BY PURELY PERSONAL CONSIDERATIONS ENTIRELY EXTRANEOUS TO THE EMPLOYER'S BUSINESS.

IN ORDER FOR PLAINTIFF TO RECOVER AGAINST THE SHERIFF FOR ANY INTENTIONAL ACT COMMITTED BY HIS DEPUTY, INCLUDING CONSPIRACY TO COMMIT AN INTENTIONAL ACT, PLAINTIFF MUST PROVE BY A PREPONDERANCE OF EVIDENCE THAT:

(1) THE DEPUTY OR EMPLOYEE OF THE SHERIFF CONSPIRED WITH DEFENDANT HALE TO COMMIT THE INTENTIONAL ACT

OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS;

(2)THE DEPUTY OR EMPLOYEE WAS AN EMPLOYEE OF THE DEFENDANT SHERIFF;

(2) THE EMPLOYEE WAS A MEMBER OF THE CONSPIRACY; AND

(3) THE ACTS IN FURTHERANCE OF THE CONSPIRACY OCCURRED DURING THE EXERCISE OF THE FUNCTION FOR WHICH EMPLOYEE WAS EMPLOYED; THAT IS, THAT THE EMPLOYEE WAS ACTING IN THE COURSE AND SCOPE OF HIS EMPLOYMENT DUTIES.

ONE ACTS IN THE "COURSE AND SCOPE" OF HIS EMPLOYMENT OR HIS EMPLOYMENT DUTIES WHEN HIS ACTIONS ARE SO CLOSELY CONNECTED IN TIME, PLACE, AND CAUSATION TO THEIR EMPLOYMENT DUTIES AS TO BE REGARDED AS A RISK OF HARM FAIRLY ATTRIBUTABLE TO THE EMPLOYER'S BUSINESS, AS COMPARED WITH CONDUCT MOTIVATED BY PURELY PERSONAL CONSIDERATIONS ENTIRELY EXTRANEOUS TO THE EMPLOYER'S BUSINESS. SOME FACTORS THAT SHOULD BE CONSIDERED IN DETERMINING WHETHER ONE IS ACTING IN THE COURSE AND SCOPE OF HIS EMPLOYMENT ARE WHETHER THE ACTS ARE PRIMARILY EMPLOYMENT ROOTED, WHETHER THE ACTS WERE REASONABLY INCIDENTAL TO

THE PERFORMANCE OF THE EMPLOYEE'S DUTIES, WHETHER THE ACTS OCCURRED ON THE EMPLOYER'S PREMISES, AND WHETHER IT OCCURRED DURING THE HOURS OF EMPLOYMENT.

THE ULTIMATE QUESTION, HOWEVER, IN DETERMINING WHETHER THE CO-CONSPIRATORS WERE ACTING IN THE COURSE AND SCOPE OF THEIR EMPLOYMENT, IS WHETHER THE EMPLOYEE'S CONDUCT WAS SO CLOSELY CONNECTED IN TIME, PLACE, AND CAUSATION TO HIS EMPLOYMENT DUTIES AS TO BE REGARDED A RISK OF HARM FAIRLY ATTRIBUTABLE TO THE EMPLOYER'S BUSINESS, AS COMPARED WITH CONDUCT MOTIVATED BY PURELY PERSONAL CONSIDERATIONS ENTIRELY EXTRANEOUS TO THE EMPLOYER'S INTERESTS.

IN THIS CONNECTION, I REMIND YOU THAT DEFENDANT HALE LEFT THE EMPLOY OF THE ST. TAMMANY PARISH SHERIFF'S OFFICE IN MAY, 1981 AND THUS HIS ACTIONS AFTER THAT DATE, UNDER LOUISIANA LAW, COULD NOT HAVE BEEN IN THE COURSE AND SCOPE OF HIS EMPLOYMENT WITH THE ST. TAMMANY PARISH SHERIFF'S OFFICE. HOWEVER, YOU MAY EXAMINE THE CONDUCT OF ANY PERSON WHOM PLAINTIFF PROVES BY A PREPONDERANCE OF EVIDENCE CONSPIRED WITH HALE TO DETERMINE IF

IT MEETS THE STANDARDS FOR DETERMINING THAT THE CO-CONSPIRATOR WAS ACTING IN THE COURSE AND SCOPE OF HIS EMPLOYMENT.

IF YOU FIND EITHER THAT THERE WAS NO CONSPIRACY BY HALE AND OTHER PERSONS TO COMMIT AN INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, OR THAT ANY PERSON WHOM HALE CONSPIRED WITH WAS NOT ACTING IN THE COURSE AND SCOPE OF HIS EMPLOYMENT WITH THE ST. TAMMANY PARISH SHERIFF'S OFFICE AT THE TIME OF THE CONSPIRACY AND ACTS IN FURTHERANCE THEREOF, YOU CANNOT HOLD THE SHERIFF LIABLE UNDER LOUISIANA LAW FOR THE CONSPIRACY ALLEGED.

IF YOU FIND THAT AT THE TIME THAT ANY CO-CONSPIRATOR COMMITTED ANY INTENTIONAL TORT, HE WAS ON A PURELY PERSONAL MISSION AT THE TIME OF THE INCIDENT WHICH WAS UNRELATED TO HIS EMPLOYMENT AND THAT IT WAS NOT SO CLOSELY CONNECTED IN TIME, PLACE AND CAUSATION TO HIS EMPLOYMENT DUTIES AS TO BE REGARDED AS A RISK OF HARM FAIRLY ATTRIBUTABLE TO THE EMPLOYER'S BUSINESS, THEN THE SHERIFF IS NOT LIABLE FOR ANY INTENTIONAL ACT BY HALE ACTING IN CONSPIRACY WITH OTHERS. IF YOU FIND

THAT THE PLAINTIFF HAS ESTABLISHED ANY ONE OF HIS CLAIMS AGAINST ANY ONE OF THE DEFENDANTS, YOU MUST NEXT DECIDE THE ISSUE OF LEGAL CAUSATION. PLAINTIFF MUST ALSO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THE ACT BY THE DEFENDANT WAS A LEGAL CAUSE OF THE DAMAGE WHICH PLAINTIFF SUFFERED. AN ACT IS THE LEGAL CAUSE OF PLAINTIFF'S DAMAGE WHEN IT IS A CAUSE-IN-FACT AND A PROXIMATE CAUSE OF THE DAMAGE THE PLAINTIFF SUFFERED. AN ACT IS A CAUSE-IN-FACT OF AN INJURY OR DAMAGES IF IT APPEARS FROM THE EVIDENCE THAT THE ACT OR OMISSION PLAYED A SUBSTANTIAL PART IN BRINGING ABOUT OR ACTUALLY CAUSING THE INJURY OR DAMAGES. AN ACT IS A PROXIMATE CAUSE OF THE PLAINTIFF'S INJURIES OR DAMAGES IF IT APPEARS FROM THE EVIDENCE THAT THE INJURY OR DAMAGE WAS A REASONABLY FORESEEABLE CONSEQUENCE OF THE ACT.

IN SUMMARY, IF YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE IN THIS CASE, AND AFTER APPLYING THESE INSTRUCTIONS ON THE LAW, THAT THE PLAINTIFF HAS PROVEN HIS CLAIMS OF CONSTITUTIONAL VIOLATION OR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, OR A CONSPIRACY TO COMMIT A CONSTITUTIONAL VIOLATION OR AN

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, YOUR VERDICT MUST BE FOR THE PLAINTIFF AND AGAINST THE APPLICABLE DEFENDANT OR DEFENDANTS.

ON THE OTHER HAND, IF YOU FIND THAT THE PLAINTIFF HAS NOT PROVEN HIS CLAIMS OF A CONSTITUTIONAL DEPRIVATION OR AN INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, OR THAT HALE, IF ACTING UNDER COLOR OF STATE LAW, WAS ACTING IN GOOD FAITH AT THE TIME OF THE CONSTITUTIONAL VIOLATION, THEN YOUR VERDICT MUST BE FOR THE DEFENDANTS AND AGAINST THE PLAINTIFF.

NOW THAT BRINGS US TO THE QUESTION OF POSSIBLE DAMAGES. THE FACT THAT I INSTRUCT YOU ON DAMAGES OR ON THE ELEMENTS OF DAMAGES, IN NO WAY IMPLIES THAT THERE IS OR IS NOT LIABILITY. IF YOU FIND NO LIABILITY, YOU DO NOT GET TO THE QUESTION OF DAMAGES. IF YOU FIND THAT THERE IS LIABILITY AND THAT PLAINTIFF HAS A RIGHT TO RECOVER IN ACCORDANCE WITH THE FACTS, WHICH YOU HAVE ASCERTAINED FROM THE EVIDENCE, AND THE INSTRUCTIONS WHICH I HAVE GIVEN YOU, THEN YOU MUST GET TO THE QUESTION OF DAMAGES. YOU WILL HAVE TO TRANSLATE THESE DAMAGES INTO DOLLARS AND CENTS.

IF YOU FIND THAT ANY DEFENDANT IS LIABLE IN THIS CASE, YOU SHOULD ASSESS

AS DAMAGES THE AMOUNT YOU FIND JUSTIFIED BY A PREPONDERANCE OF THE EVIDENCE AS FULL AND JUST COMPENSATION FOR ALL OF THE PLAINTIFF'S DAMAGES, NO MORE AND NO LESS. DAMAGES ARE NOT ALLOWED AS A PUNISHMENT AGAINST A PARTY, EXCEPT FOR PUNITIVE DAMAGES, WHICH IS WILL EXPLAIN SHORTLY, AND CANNOT BE IMPOSED OR INCREASED TO PENALIZE THE DEFENDANT. NEITHER CAN DAMAGES BE BASED ON SPECULATION, FOR IT IS ONLY ACTUAL DAMAGES -- WHAT THE LAW CALLS COMPENSATORY DAMAGES -- THAT ARE RECOVERABLE. ON THE OTHER HAND, COMPENSATORY DAMAGES ARE NOT RESTRICTED TO ACTUAL LOSS OF TIME OR MONEY: THEY COVER BOTH THE MENTAL AND ECONOMIC ASPECTS OF INJURY AND DAMAGE, TANGIBLE AND INTANGIBLE.

YOU SHOULD CONSIDER THE FOLLOWING ELEMENTS OF DAMAGES TO THE EXTENT THAT YOU FIND THEM PROVED BY A PREPONDERANCE OF THE EVIDENCE, AND NO OTHERS; DAMAGES FOR THE LOSS OF FREEDOM AND IMPRISONMENT BY THE PLAINTIFF, PHYSICAL AND MENTAL SUFFERING, MENTAL ANGUISH, ANXIETY AND EMOTIONAL DISTRESS, ECONOMIC LOSS, AND LEGAL EXPENSES WHICH HE WOULD NOT HAVE OTHERWISE INCURRED. NO EVIDENCE OF THE VALUE OF SUCH INTANGIBLE THINGS AS LOSS OF

FREEDOM, PHYSICAL OR MENTAL SUFFERING OR ANGUISH HAS BEEN OR NEED BE INTRODUCED FOR, IN THAT RESPECT, IT IS NOT VALUE YOU ARE TRYING TC DETERMINE, BUT AN AMOUNT THAT WILL FAIRLY COMPENSATE THE PLAINTIFF FOR THE DAMAGES HE HAS SUFFERED.

PLAINTIFF ALSO MAKES A CLAIM FOR PUNITIVE DAMAGES AGAINST BOTH OF THE DEFENDANTS. YOU MAY AWARD PUNITIVE DAMAGES TO THE PLAINTIFF IF THE PLAINTIFF HAS PROVED THAT THE DEFENDANT ACTED WITH MALICE OR WILLFULNESS OR WITH CALLOUS AND RECKLESS INDIFFERENCE TO THE RIGHTS OF OTHERS. ONE ACTS WILLFULLY OR WITH RECKLESS INDIFFERENCE TO THE RIGHTS OF OTHERS WHEN HE ACTS IN A SHOCKING AND OFFENSIVE MANNER IN PLAIN DISREGARD TO THE RIGHTS OF OTHERS WHICH HE KNOWS OR WHICH WOULD BE APPARENT TO A REASONABLE PERSON IN HIS POSITION.

IF YOU DETERMINE THAT THE DEFENDANT'S CONDUCT WAS SO SHOCKING AND OFFENSIVE AS TO JUSTIFY AN AWARD OF PUNITIVE DAMAGES, YOU MAY EXERCISE YOUR DISCRETION TO AWARD THOSE DAMAGES. IN MAKING ANY AWARD OF PUNITIVE DAMAGES, YOU SHOULD CONSIDER THAT THE PURPOSE OF PUNITIVE DAMAGES IS TO PUNISH A

DEFENDANT FOR SHOCKING CONDUCT, AND TO DETER THE DEFENDANT AND OTHERS FROM ENGAGING IN SIMILAR CONDUCT IN THE FUTURE. THE LAW DOES NOT REQUIRE YOU TO AWARD PUNITIVE DAMAGES, HOWEVER, IF YOU DECIDE TO AWARD PUNITIVE DAMAGES, YOU MUST USE SOUND REASON IN SETTING THE AMOUNT OF THE DAMAGES. THE AMOUNT OF AN AWARD OF PUNITIVE DAMAGES MUST NOT REFLECT BIAS, PREJUDICE, OR SYMPATHY TOWARD ANY PARTY. HOWEVER, THE AMOUNT CAN BE AS LARGE AS YOU BELIEVE NECESSARY TO FULFILL THE PURPOSES OF PUNITIVE DAMAGES. YOU MAY CONSIDER THE FINANCIAL RESOURCES OF THE DEFENDANT IN FIXING THE AMOUNT OF PUNITIVE DAMAGES. YOU MAY DECLINE TO AWARD PUNITIVE DAMAGES, MAY IMPOSE PUNITIVE DAMAGES AGAINST ONE OF THE DEFENDANTS, AND NOT THE OTHER, OR MAY IMPOSE PUNITIVE DAMAGES AGAINST BOTH DEFENDANTS IN DIFFERENT AMOUNTS.

ANY AWARD YOU MAKE IS NOT SUBJECT TO INCOME TAX, AND ANY AMOUNT WHICH YOU AWARD ON THIS BASIS WILL NOT BE TAXED BY THE STATE OR FEDERAL GOVERNMENT. THEREFORE, AS TO ANY SUCH AWARD YOU ARE TO INDICATE THE AMOUNT THAT PLAINTIFF IS ENTITLED TO RECEIVE WITHOUT CONSIDERING THE EFFECT OF TAX ON IT.

I CHARGE YOU THAT THE STATEMENT OF EITHER COUNSEL IN THIS CASE AS TO AN ESTIMATE OF DOLLAR AMOUNTS TO BE AWARDED FOR LOSS OF FREEDOM AND IMPRISONMENT, PHYSICAL OR MENTAL SUFFERING AND EMOTIONAL ANGUISH, AND PUNITIVE DAMAGES ARE NOT EVIDENCE, BUT THEY MAY BE CONSIDERED BY YOU IN ARRIVING AT THE PROPER AMOUNT OF DAMAGES. THERE IS NO MATHEMATICAL FORMULA FOR ARRIVING AT SUCH DAMAGES, AND, AS I HAVE STATED, THE DETERMINATION OF THESE DAMAGES IS LEFT TO YOUR SOUND DISCRETION.

THE MERE FACT THAT I HAVE GIVEN YOU INSTRUCTIONS ON THE LAW OF DAMAGES DOES NOT IN ANY WAY SUGGEST THAT I BELIEVE THAT ANY DAMAGES ARE DUE IN THIS CASE. WHETHER OR NOT ANY DAMAGES ARE DUE IS FOR YOU TO DECIDE.

YOUR VERDICT MUST REPRESENT THE CONSIDERED JUDGMENT OF EACH JUROR. IN ORDER TO REACH A VERDICT IT IS NECESSARY THAT EACH JUROR AGREE. YOUR VERDICT MUST BE UNANIMOUS.

IT IS YOUR DUTY, AS JURORS, TO CONSULT WITH ONE ANOTHER, AND TO DELIBERATE WITH A VIEW TO REACHING AN AGREEMENT, IF YOU CAN DO SO WITHOUT VIOLENCE TO INDIVIDUAL JUDGMENT. YOU MUST EACH DECIDE THE CASE FOR

YOURSELF, BUT ONLY AFTER AN IMPARTIAL CONSIDERATION OF THE EVIDENCE IN THE CASE WITH YOUR FELLOW JURORS. IN THE COURSE OF YOUR DELIBERATIONS, DO NOT HESITATE TO RE-EXAMINE YOUR OWN VIEW, AND CHANGE YOUR OPINION, IF CONVINCED IT IS ERRONEOUS. BUT DO NOT SURRENDER YOUR HONEST CONVICTION AS TO THE WEIGHT OF THE EVIDENCE OR THE EFFECT OF THE EVIDENCE, SOLELY BECAUSE OF THE OPINION OF YOUR FELLOW JURORS, OR FOR THE MERE PURPOSE OF RETURNING A VERDICT.

REMEMBER AT ALL TIMES THAT YOU ARE NOT PARTISANS. YOU ARE JUDGES -- JUDGES OF THE FACTS. YOUR SOLE INTEREST IS TO SEEK THE TRUTH FROM THE EVIDENCE IN THE CASE.

UPON RETIRING TO THE JURY ROOM, YOU WILL SELECT ONE OF YOUR NUMBER AS YOUR FOREPERSON. THE FOREPERSON WILL PRESIDE OVER YOUR DELIBERATION, AND WILL BE YOUR SPOKESPERSON HERE IN COURT. A FORM OF SPECIAL VERDICT HAS BEEN PREPARED FOR YOUR CONVENIENCE. YOU WILL TAKE THIS FORM TO THE JURY ROOM.

YOU WILL NOTE THAT THE FORM CONTAINS SEVERAL INTERROGATORIES OR QUESTIONS. THE ANSWER TO EACH QUESTION MUST BE THE UNANIMOUS

ANSWER OF THE JURY. IN THE SPACE PROVIDED BELOW EACH QUESTION YOU WILL FIND DIRECTIONS WHICH INSTRUCT YOU EITHER TO ANSWER THE NEXT QUESTION, TO ANSWER SOME OTHER QUESTION, OR TO STOP AND RETURN TO THE COURTROOM WITH YOUR VERDICT. YOU MUST CAREFULLY FOLLOW THESE DIRECTIONS AS YOU COMPLETE THE FORM.

AT THE CONCLUSION OF YOUR DELIBERATIONS, THE FOREPERSON SHOULD DATE AND SIGN THE SPECIAL VERDICT FORM.

IF IT BECOMES NECESSARY DURING YOUR DELIBERATIONS TO COMMUNICATE WITH THE COURT, YOU MAY SEND A NOTE BY THE MARSHAL, SIGNED BY THE FOREPERSON, OR BY ONE OR MORE MEMBERS OF THE JURY. NO MEMBER OF THE JURY SHOULD EVER ATTEMPT TO COMMUNICATE WITH THE COURT BY ANY MEANS OTHER THAN A SIGNED WRITING, AND THE COURT WILL NEVER COMMUNICATE WITH ANY MEMBER OF THE JURY ON ANY SUBJECT TOUCHING ON THE MERITS OF THE CASE OTHER THAN IN WRITING, OR ORALLY HERE IN OPEN COURT.

BEAR IN MIND THAT YOU ARE NEVER TO REVEAL TO ANY PERSON -NOT EVEN TO THE COURT -- HOW THE JURY STANDS, NUMERICALLY OR OTHERWISE, ON THE

QUESTIONS BEFORE YOU, UNTIL AFTER YOU HAVE REACHED A UNANIMOUS VERDICT.

A. Yes, I'm Chief Investigator for Walter Reed.

Q. And you were employed as an investigator back in '86, '87, '88, that time frame?

A. Yes, I was.

Q. During that time frame were you all having some difficulties receiving supplemental reports from the law enforcement agencies of St. Tammany Parish?

A. That's an ongoing with all agencies that we deal with. Q. Including the St. Tammany Parish Sheriff's Office?

A. We had to call them and get supplemental reports if it comes in after the original files are sent to us, when the original files are sent to us from Records. If anything comes in additional after that, then we call or either go get it from Records.

Q. But there was no policy in effect where the -- where they would just send it over to you as it came in, was there?

A. Not to my knowledge. They're filed under one item number. And we file under a docket number. And it's -- it would be a difference when it come in our office. You'd have to located where it goes.

What happens when I get the case file, when I read the case file, if I see there's something in there where an officer took a taped statement and if a copy of the statement is not in the file, then I'll go to Records, call Records and we'll get a copy of that

statement. They'll either fax it to me or either I'll go pick it up.

Q. So, with the Sheriff's Office you all have problems getting information that they actually have?

A. Not only the Sheriff's Office, that's all the agencies that we handle.

Q. So, the -- the procedures that were in effect by the Sheriff's Office and the other agencies were -- was ineffective; isn't that true?

A. I wouldn't say it's ineffective, because once the paperwork comes, it's under their item number, then our girls wouldn't know how to file it.

Q. But then after -- all you'd only know if something was missing if you happened to make the phone call, correct?

A. I'm sorry?

Q. How would you know that they developed supplemental information if they wouldn't just send it over?

A. It's in -- when I read the case file, if it says in there supplement report to file, and the supplemental report is not in there, then I'll call Records to get that supplemental report. If it says, I took a taped statement and that taped statement is not in the file, then I'll call Records, because all the time these -- taped statements are not transcribed right away.

Q. So they wouldn't automatically send over these supplemental reports or the -- or the taped statements when they first make the delivery to your office.

A. Sometimes they do, sometimes the officer brings it over himself.

Q. Okay, so it wasn't -- there wasn't a set policy at all as to how -- who would send it over, was there?

A. No, but it's always in Records when –

Q. Okay.

A. -- we go to get it.

Q. But how would it get from Records to your office? Either sometimes Records would do it or sometimes the investigating officer would bring it over themselves, right?

A. Or either an investigator from the DA's Office that's handling that particular case will make arrangements and go get it himself or they'll fax it to him.

Q. If there's no indication in the file that there was a supplemental report or if nothing said, supplemental report to follow, you wouldn't know if a supplemental report had been made.

A. I wouldn't know it was in there.

Q. And if the reports that's first issued makes no reference to, say for instance, no reference that a taped statement of a witness was done, you wouldn't know to go look for that taped statement, would you?

A. Not if there's no reference to it in the file.

Q. Unless they had automatically sent it over, which they...

A. July 1st of 1980 to July 1st of 1996.

Q. Between 1980 and 1986, what were the policies, procedures, and practices of the St. Tammany Parish Sheriff's Office with regard to turning over investigation materials uncovered to the District Attorney's Office?

A. What were the policies?

Q. Yes.

A. You'd have to ask someone that was in charge of that someone in Records Division or Detective Division. I don't know the policy.

Q. You were the sheriff though, correct?

A. Yes, I was.

Q. You did not familiarize yourself with the policies?

A. Well, Mr. Smith, I had a very large department and there was a lot of policies. I had supervisors under me that handled that.

Q. And who was under -- who was in charge of records during that time?

A. I would think it would be Debbie McCormick.

Q. Do you know what McCormick -- Miss -- what training Ms. McCormick had with regard to handling records?

A. No, I do not. She was employed when I was elected.

Q. Okay. What training did you have with regard to record keeping or compiling investigation materials?

A. None.

cases. Now, most of those are traffic tickets, but it is a tremendously difficult job to properly assemble that many cases.

Q. Wouldn't you agree, Mr. Reed, that in light of that, in light of the importance of this paperwork, in this case, Mr. Burge was wrongfully -- was wrongfully convicted or was given a raw -- a trial that was unfair because the documentation wasn't given to him. Wouldn't you agree that because of the volume of the paperwork and the sheer importance of the paperwork, that you need to have people who are very well trained and very familiar with the policies of the office with regard to that paperwork?

A. I'd say that's absolutely important, and we do. I'm proud of the staff that I've assembled. I would have to say that I'm proud of the staff that Sheriff Canulette and now Sheriff Strain has improved on that. But we're all human beings. And when you're dealing with 50,000 cases a year, there are going to be a number of cases that are just not handled properly. We're all human beings and we make mistakes and we're not perfect, and those things happen.

Q. And sometimes people just get caught in the gears of the machine and ground up?

A. I don't -- what do you mean "ground up"?

Q. Well, I mean, you said people make mistakes and if a mistake is made where vital documents or vital evidence is not turned over to the defendant because of some paperwork error, or alleged paperwork error,

then unless it's discovered, that defendant is just out of luck, isn't he?

A. We do our best to try to ensure that –

Q. I don't doubt that you do your best.

A. -- that that does not happen, but with the number of cases that we handle, sometimes it does, yes.

Q. And you can't turn over to the defendant, pursuant to your duty under Brady and the U.S. Constitution of the country and the Constitution of Louisiana, documents that you haven't been provided by the sheriff, can you?

A. That's true. That's correct.

MR. SMITH: Thank you, sir.

THE COURT: Ms. Kern.

MS. KERN: Yes, sir.

REDIRECT EXAMINATION

BY MS. KERN:

Q. Just a couple of follow up questions, Mr. Reed. What Mr. Arthur testified to was that from time to time, after receiving the initial package of materials on an arrest, he would have to follow up with the Sheriff's Office to get supplemental reports that might be referred to, or there might be a statement referred to in the detective's resume that isn't in the first package of

material that comes. Is that unusual in your experience?

A. No. That would be the -- that would be consistent with my earlier testimony that there are minor problems. But to say that there is a real problem, that's one of the -- that's what I do, you know, as District Attorney. I deal with problems that exist in my department and that has not been a problem, I'm glad to say, in my 16 years as DA. The paper flow between the office -- offices of the eleven law enforcement agencies that I work with has not been perfect, but it has not been a problem either.

Q. What Mr. Arthur says that when he discovers something that is indicated missing in the original package of materials he gets from the Sheriff's Office, say a supplemental report that he doesn't receive; is he calls the records room and he says, "I need this." They either fax it to him or they send it over, or he goes over and gets it. He says he has complete cooperation with -- from them when he makes those types of requests.

Has he ever reported anything other than that to you?

A. No, and I have a staff meeting every Monday and we talk about things. We talk about problems, what -- and I turn to my staff, the misdemeanor chief, the felony chief: What problems? Are we having any problems? And you know, I've never had in a staff meeting, somebody says, "Yeah, boss, the Sheriff's office is screwing up the paperwork," or, the...

Supreme Court, U.S.
FILED
DEC 8 - 2003
OFFICE OF THE CLERK

No. 03-679

In The
Supreme Court of the United States

GERALD BURGE,

Petitioner,

v.

RODNEY JACK STRAIN,
Sheriff of St. Tammany Parish,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in reversing a *Monell* judgment against a parish sheriff based on inadequacies in recordkeeping policies where the plaintiff failed to offer any evidence of a pattern of constitutional violations resulting from the allegedly defective policies?

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REASONS FOR DENYING THE WRIT

According to the plaintiff's Petition, the sole question presented by the writ is whether a *Monell* claim for damage under U.S.C.A. section 1983 can ever arise "the first time" a longstanding policy, custom, or practice of a municipality results in a constitutional violation.

In reversing a jury verdict against the St. Tammany Parish Sheriff, the Court of Appeals found that plaintiff Gerald Burge failed to present evidence of even a single other constitutional violation arising from the Sheriffs' allegedly defective recordkeeping policies in the thirty years prior to the May, 2001 trial. The decision of the 5th Circuit Court of Appeals is entirely consistent with other cases from that circuit, and from the Supreme Court that require proof of more than a single instance of lack of training or supervision causing a violation of constitutional rights before such lack of training or supervision constitutes deliberate indifference – the standard required to support a finding of official liability on the part of the policymaker.

ARGUMENT

Gerald Burge filed this civil rights action in 1991, seeking damages as a result of his conviction in 1986 of the October, 1980 murder of Douglas Frierson. Burge alleged his conviction was obtained in violation of his constitutional right to a fair trial and due process as a result of the District Attorney's failure to provide his defense counsel with exculpatory information, specifically a statement given by Jean Frierson (the victim's mother)

to St. Tammany Parish deputy sheriff Gary Hale on the morning her son's body was discovered.

Burge has contended that the mother's statement was not provided by the Sheriff to the District Attorney prior to the 1986 trial, and that the Sheriff was therefore to blame for the D.A.'s failure to meet his obligations under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L. Ed. 2d 215 (1963). Burge attempted to prove at trial that the Sheriff's training, supervision, policies or procedures regarding the handling of records of criminal investigations were constitutionally defective.

At trial, undisputed evidence was presented that it was the St. Tammany Parish Sheriff's policy to turn over all resumes, reports, transcripts of witness interviews and all other documents generated during the course of a criminal investigation to the District Attorney. For purposes of its opinion, the 5th Circuit assumed that the Sheriff's Office failed to transfer the entire investigatory file to the District Attorney in the Burge case, and that such a failure was a cause of the *Brady* violation.[1] Considering all of the evidence offered at trial in the light most favorable to the plaintiff, the Court of Appeals concluded that Burge had failed to offer sufficient proof to support a finding that the Sheriff's recordkeeping training, policies and procedures were constitutionally defective. This conclusion by the 5th Circuit was mandated by the trial evidence.

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[1] The Sheriff has always disputed this contention by Burge. The loss by the District Attorney of his entire file on two separate occasions in the 1990s precluded any final factual resolution of this issue.

Burge's entire argument to this Court is based upon extremely brief excerpts from the testimony of District Attorney Walter Reed, and his chief investigator, Mario Arthur. The entirety of the testimony of these two witnesses was considered by the Court of Appeals and is specifically discussed in its opinion.

Mario Arthur (an investigator with the D.A.'s office), testified that he occasionally had to request copies of supplemental reports or transcripts of statements obtained from witnesses after the initial transmittal of the Sheriff's file to the D.A. Arthur also testified that the deputies in the records division of the Sheriff's office always quickly responded to his requests for documents, and that he had never requested a document from the Sheriff which had not been produced.

Walter Reed also denied that his office had experienced difficulties in obtaining records from the Sheriff during his 16 years as District Attorney, adding that only in a few instances did they ever have to call the Sheriff to look for something and on some of those occasions the information had already been sent to the District Attorney's Office and had just been overlooked. Reed stated that he has never had a staff member complain of any problems with getting information from the Sheriff.

Reed also testified that, other than the Burge case, he was aware of no case in which a claim had even been made that material had been withheld by the Sheriff from the District Attorney's Office.

In support of his Petition, Burge cites what he characterizes as the startling confession by District Attorney Walter Reed that "when you are dealing with 50,000 cases a year . . . we make mistakes and we're not perfect". The

District Attorney's admission of his staff's lack of perfection in dealing with 50,000 cases a year is hardly evidence of persistent, often repeated, constant violations by anyone and certainly not by the Sheriff's Office.

The Sheriff cannot be found officially liable for defects in his records keeping policy and procedures in the complete absence of evidence of a pattern of constitutional violations resulting from the stated policy and the manner in which it was followed. In thirty years, only the plaintiff in this single case has claimed that any documents or records contained in the Sheriff's investigative file were not forwarded by the Sheriff to the District Attorney.

It is undisputed, even by Burge, that proof of a pattern of violations is a prerequisite to a claim of deliberate indifference. The 5th Circuit Court of Appeals has so held in numerous opinions, most recently in *Oregon v. Houston*, 291 F.3d 325 (5th Cir. 2002). See also *Piotrowski v. City of Houston*, 237 F.3d 567 (5th Cir. 2001); *Thompson v. Upshur County, Texas*, 245 F.3d 447 (5th Cir. 3/15/01); and *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L. Ed. 2d 412 (1989).

Isolated violations are not the persistent, often repeated, constant violations, that constitute custom and policy as required for municipal section 1983 liability. A customary municipal policy cannot ordinarily be inferred from single constitutional violations.

The burden of proof applicable to a claim of inadequate training was considered in *Brown v. Bryan County*,

219 F.3d 450 (5th Cir. 2000).[2] To prevail on such a claim, Burge must prove not only that the employees were inadequately trained but that the Sheriff was aware of the inadequacy of the training and was deliberately indifferent to the "known or obvious consequences" that constitutional violations would result therefrom.

Burge's claim that proof of a single constitutional violation resulting from the Sheriff's recordkeeping training or policies can support a *Monell* claim is premised almost entirely upon the *Brown* opinion. Although the majority in *Brown* did recognize that municipal liability can attach to a single decision by a *policymaker* not to train an individual, the Court made it equally clear that liability cannot attach unless the policymaker was *deliberately indifferent* to the need for additional training because the need for more or different training was so obvious and the inadequacy of the training was so likely to result in a violation of constitutional rights.

A comparison of the evidence presented in *Brown* confirms the adequacy of the Sheriff's records officer training in this case. In *Brown*, the Upshur County sheriff decided not to provide any training in arrest procedures to an inexperienced reserve deputy who had only been on the force for a few weeks. The reserve deputy, who was a close relative of the sheriff, had a fairly extensive criminal record which included an arrest for assault and battery.

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[2] *Brown* contained a pointed dissent, and en banc consideration was denied due to a tie vote of the 14 judges on the circuit. 235 F.3d 944 (5th Cir. 2000). *Brown* also predated *Thompson v. Upshur County, Texas*, 245 F.3d 447 (5th Cir. 3/15/01), which recognized that proof of a pattern of conduct is normally required.

The deputy had already engaged in an excessive number of "take down" arrests during his brief service prior to the incident. The plaintiff offered proof of several different training programs that were available, some free of charge, to the sheriff. Nevertheless, the Sheriff elected not to offer any training for the reserve deputy. As one might expect, the reserve deputy shortly thereafter injured someone by using excessive force in attempting a "take down" arrest. Given those facts, the court determined that the Sheriff was aware of sufficient information to make it obvious that training in arrest procedures was needed for this deputy and that in the absence of that training, a constitutional deprivation would occur.

Unlike the plaintiff in *Brown*, Burge has not identified a need for additional or different training other than the on-the-job training invariably provided by the Sheriff to records room officers. Burge offered no evidence of available additional or different training, nor of how it would have made a difference. The uncontested facts established that the records personnel trained under experienced deputies in that division. The efficiency of the records division during the twenty years of Deputy McCormick's service confirms that the training provided is more than sufficient. The Court of Appeals concluded without reservation that the evidence offered by Burge at trial failed to support a reasonable inference that the likelihood of violations of constitutional rights were "so obvious" that the Sheriff was deliberately indifferent to the need to institute more training, or to change his record handling policies in some other unspecified manner.

The record in this case is devoid of any proof of a custom of persistent, widespread failures to transfer investigatory information to the District Attorney upon

request which resulted in the deprivation of the constitutional rights of individuals. All of the evidence established the opposite.

Not only did Burge fail to prove a pattern of past constitutional violations, he produced no evidence of even a single instance of information being withheld or lost by the records personnel before or after the Burge case. Not one piece of evidence nor one witness was called to establish that the Sheriff's procedures for recordkeeping had resulted in information being lost or not provided to the District Attorney upon request on any occasion prior to the Burge case, or during the fifteen years between Burge's 1986 murder trial, and the 2001 trial in his civil rights action.

CONCLUSION

The Court of Appeals correctly concluded that the evidence offered by Burge at trial, interpreted in the light most favorable to the plaintiff, falls far short of satisfying the stringent, rigorous burden imposed upon him to prove a constitutionally deficient policy or practice of the Sheriff. Such proof requires a pattern of persistent, wide spread violations of rights which is completely lacking in this case. In the absence of such proof, the Sheriff cannot be found deliberately indifferent to the "known or obvious consequences" that constitutional violations would result

from existing practices. Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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